No. 350959

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JAMES COURTNEY and CLIFFORD COURTNEY,

Appellants,

v.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; DAVID DANNER, chairman and commissioner, ANN RENDAHL, commissioner, and PHILIP JONES, commissioner, in their official capacities as officers and members of the Washington Utilities and Transportation Commission; and STEVEN KING, in his official capacity as executive director of the Washington Utilities and Transportation Commission,

Appellees.

OPENING BRIEF OF APPELLANTS JAMES AND CLIFFORD COURTNEY

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I. INTRODUCTION

James and Clifford Courtney seek judicial review of the declaratory order ("Declaratory Order") issued by the Washington Utilities and Transportation Commission ("WUTC") in Docket No. TS-151359.[1] The WUTC determined that the certificate of "public convenience and necessity" requirement set forth at RCW 81.84.010(1) and WAC 480-51-025(2) applies to boat transportation on Lake Chelan that is provided solely for customers of a specific business or group of businesses. The constitutionality of applying the certificate requirement to such service is at issue in *Courtney v. Danner*, 2:11-cv-00401-TOR (E.D. Wash.), which the federal courts have abstained from resolving until the Courtneys obtain a decision from the WUTC and Washington courts as to whether the certificate requirement, in fact, applies to such service.

II. *ENGLAND* RESERVATION

Under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964), the Courtneys:

1. Apprise this Court of the pendency of *Courtney v. Danner*, over which the U.S. District Court for the Eastern District of Washington has exercised *Pullman* abstention and retained jurisdiction, *see* CP 252-54;

2. State their intention, and reserve their right, to return to federal

[1] The administrative record is contained in the Clerk's Papers at pages 40-512. Though paginated with the prefix "CLP," the Clerk's Papers are referred to herein using "CP."

court to litigate their federal Privileges or Immunities Clause claim and any other federal issues after resolution of state proceedings; and

3. State that they will not litigate the constitutionality of the certificate of public convenience and necessity requirement in this court.

III. ASSIGNMENTS OF ERROR

1. The Declaratory Order exceeds the WUTC's statutory authority insofar as it applies the certificate of "public convenience and necessity" ("PCN") requirement set forth at RCW 81.84.010(1) and WAC 480-51-025(2)[2] to boat transportation on Lake Chelan that is provided solely for customers of a specific business or group of businesses under the circumstances described in the Courtneys' petition for declaratory order. *See* CP 432-34, 393-94.

2. The Declaratory Order is arbitrary and capricious because it demands a PCN certificate for the services set forth in the Courtneys' petition for declaratory order even though the WUTC exempts substantively identical transportation services in the non-waterborne context, as well as waterborne "charter service," from the requirement of a public convenience and necessity certificate. *See* CP 434-38.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 81.84.010(1) requires a PCN certificate only for boat

[2] In accordance with RAP 10.4(c), the verbatim text of the primary statutes and regulations cited in this brief is set forth in the accompanying appendix.

transportation that is "for the public use." Is boat transportation on Lake Chelan that is provided solely for customers of a specific business or group of businesses, under the circumstances described in the Courtneys' petition for declaratory order, "for the public use"? (Assign. of Error 1)

2. The WUTC exempts, from the requirement of a PCN certificate: (a) "[p]ersons owning, operating, controlling, or managing . . . hotel buses"; (b) "[p]rivate carriers who, in their own vehicles, transport passengers as an incidental adjunct to some other established private business owned or operated by them in good faith"; and (c) "[t]ransporting transient air flight crew or in-transit airline passengers between an airport and temporary hotel accommodations under an arrangement between the airline carrier and the passenger transportation company." WAC 480-30-011(6), (8), (9). Is it therefore arbitrary or capricious to *require* a PCN certificate for boat transportation on Lake Chelan that is provided solely for customers of a specific business or group of businesses under the circumstances described in the Courtneys' petition for declaratory order? (Assign. of Error 2)

3. The WUTC exempts "[c]harter service[]"—that is, "the hiring of a vessel, with captain and crew, by a person or group for carriage or conveyance of persons or property," WAC 480-51-020(14)—from the requirement of a PCN certificate. WAC 480-51-022(1). Is it therefore

arbitrary or capricious for the WUTC to *require* a PCN certificate in a situation where a Stehekin-based travel company contracts, by private charter agreement, for the transportation of customers who have purchased travel packages directly from the travel company? (Assign. of Error 2)

V. STATEMENT OF THE CASE

The facts in this case are lengthy and are discussed in detail below. However, they may be summarized as follows:

- The Courtneys have long sought to provide boat transportation service on Lake Chelan for customers of a specific business (*e.g.*, Clifford Courtney's Stehekin Valley Ranch) or group of businesses (*e.g.*, other Courtney-family businesses). CP 50-56.

- The Courtneys have been foreclosed from operating such service by the WUTC, which requires a PCN certificate to provide ferry service on Lake Chelan. CP 49-56.

- The PCN requirement has resulted in a monopoly of ferry service on Lake Chelan—a monopoly that has been in the hands of Lake Chelan Boat Company since 1929. CP 50.

- The Courtneys filed a federal lawsuit asserting that application of the PCN requirement to their proposed boat transportation service violates the Privileges or Immunities Clause of the 14th Amendment to the U.S. Constitution. CP 56-57, 86-126.

- The Ninth Circuit held that the Courtneys have standing to pursue their federal constitutional challenge but that abstention was warranted to give the WUTC and state courts an opportunity to formally address whether the PCN requirement applies to boat service limited to customers of a specific business or group of businesses. CP 245-50.

- The Courtneys petitioned the WUTC for a declaratory order, and the WUTC concluded that the PCN requirement does apply to such service. CP 45-75, 429-39.

- The Courtneys petitioned for judicial review in Chelan County Superior Court, which affirmed the WUTC's order. CP 739.

A. Lake Chelan

Lake Chelan is a 55-mile-long lake in the North Cascades. CP 48. The city of Chelan lies at its southeast end; the unincorporated community of Stehekin lies at its northwest end. CP 48. Stehekin is a popular summer destination that draws visitors from Washington and beyond. CP 259-60.

Stehekin and much of the lake's northwest end are part of the Lake Chelan National Recreation Area (hereinafter "LCNRA"), which is accessible only by boat, plane, or foot; Lake Chelan thus provides a critical means of access to Stehekin and the LCNRA. CP 48. The lake has been designated a navigable water of the United States. CP 223, 291.

B. Ferry Regulation On Lake Chelan

Regulation of ferries on Lake Chelan began in 1911, with a law addressing safety issues and fares. It did not impose significant barriers to entry, and by the early 1920s, four ferries operated on the lake. CP 260-61.

In 1927, however, the legislature prohibited anyone from offering ferry service without first obtaining a certificate of "public convenience and necessity." CP 261. Today, a PCN certificate is required to "operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state." RCW 81.84.010(1).

An applicant for a certificate must prove, among other things, that its proposed service is required by the "public convenience and necessity," that it "has the financial resources to operate . . . for at least twelve months," and, if the territory is already served by a ferry, that the existing certificate holder: "has not objected to the issuance of the certificate as prayed for"; "has failed or refused to furnish reasonable and adequate service"; or "has failed to provide the service described in its certificate." RCW 81.84.010(1), .020(1)-(2). The WUTC notifies the would-be ferry provider's competitors—that is, "all persons presently certificated to provide service"—of the application, and they, in turn, may protest it. WAC 480-51-040(1). The WUTC then conducts an adjudicative proceeding, akin to a civil suit, in which protesting ferry providers may

participate as parties. *See* WAC 480-07-300(2)(c), -305(3)(e), -340(3)(g). The applicant bears the burden of proof on every element for a certificate.

C. Consequence Of The PCN Requirement

In October 1927, the year the PCN requirement was imposed, the state issued the first—and, to this day, only—certificate for ferry service on Lake Chelan. CP 262. Since 1929, it has been held by Lake Chelan Boat Company. CP 262. At least four other applications have been made, but, in each instance, Lake Chelan Boat Company protested and the applicant was denied a certificate. CP 262-65.

D. The Courtneys' Efforts To Provide An Alternative Service

Petitioners Jim and Cliff Courtney are brothers, fourth-generation residents of Stehekin, and the plaintiffs in *Courtney v. Danner*. CP 50. Jim is a contractor and former owner or part-owner of two float-plane companies. CP 47. Cliff and his wife are the sole members of Stehekin Valley Ranch, LLC, which owns Stehekin Valley Ranch, a rustic ranch with cabins and a lodge house. CP 47. Jim and Cliff have other siblings and children who own businesses in the community, including Stehekin Outfitters, Stehekin Log Cabins, and Stehekin Pastry Company. CP 50.

For years, Jim and Cliff listened as customers complained about the inconvenience of Lake Chelan's lone ferry. Accordingly, since 1997, they have initiated four significant efforts to provide alternative boat

transportation services on the lake, but they have been thwarted by the PCN requirement at every turn.

1. Application For A PCN Certificate

First, in 1997, Jim applied for a PCN certificate to operate a Stehekin-based ferry. CP 129. Lake Chelan Boat Company protested the application, and the WUTC held a two-day evidentiary hearing. CP 129. Following the hearing and post-hearing briefing, the ALJ entered an initial order denying Jim's application. CP 129. Jim petitioned for review, but the WUTC affirmed, denying him a certificate in August 1998. CP 155. Jim incurred approximately $20,000 in expenses in the process. CP 51.

2. On-Call Boat Service

Second, in 2006, Jim pursued a Stehekin-based, on-call boat service that he believed fell within a "charter service" exemption to the PCN requirement. CP 51. Because much of Lake Chelan is in a national recreation area and many of its docking sites are federally-owned, Jim applied to the U.S. Forest Service for a permit to use the docks. CP 51-52. Before it would issue the permit, however, the Forest Service sought to confirm with the WUTC that the service was, in fact, exempt. CP 52.

After initially opining that Jim's on-call boat service was exempt from the PCN requirement, WUTC staff changed their mind when Lake Chelan Boat Company objected to the proposal. CP 158. But staff later

reversed course again. CP 158. Because of the conflicting guidance—and because "the current passenger ferry operation, [t]he Lake Chelan Boat Company, is concerned over a second ferry service on the Lake"—the Forest Service's district ranger wrote to the WUTC's then-executive director, David Danner, for his opinion. CP 158. Mr. Danner, however, declined to give his opinion, and Jim could not launch the service. CP 52.

3. Service For Customers Of Courtney-Family Businesses

Third, in 2008, Cliff wrote Mr. Danner a letter presenting "several scenarios" and asking for "help . . . to understand what leeway we have without applying for another certificate." CP 207. The first scenario was one in which "I have chartered . . . [a] vessel for my guests"—for example, persons who "want[] to stay at the ranch [and] go river rafting"—and offer a package with transportation on the chartered boat as one of the guests' options. CP 208. The second was one in which "I buy the . . . boat and carry my own clients . . . [who] are booked on to one of my packages or in to one of the facilities I manage." CP 209. Mr. Danner responded, opining that such services required a PCN certificate, which the WUTC would provide "*only* if it determined that Lake Chelan Boat Company was not providing reasonable or adequate service" or "did not object to you operating a competing service." CP 212.

Cliff sent another letter, stressing that these services would "be

incidental to a former and much larger engagement of services with our companies." CP 216. Mr. Danner, however, reiterated his earlier conclusion, stating it "does not matter whether the transportation you would provide is 'incidental to'" other businesses because it would still be "for the public use for hire." CP 220. WUTC staff, he noted, interprets the term "for the public use for hire" to include "all boat transportation that is offered to the public—even if use of the service is limited to the guests of a particular hotel or resort, or even if the transportation is offered as part of a package of services that includes lodging, a tour, or other services that may constitute the primary business of the entity providing the transportation as an adjunct to its primary business." CP 220.

4. Legislative Fix

Finally, in 2009, Cliff sent a letter to the governor and his state legislators urging them to eliminate or relax the PCN requirement. CP 55. The legislature passed, and governor signed, a bill directing the WUTC to study and report on the appropriateness of the regulations governing ferry service on Lake Chelan. CP 55. The WUTC published its report in 2010 and recommended there be no "changes to the state laws dealing with commercial ferry regulation as it pertains to Lake Chelan." CP 287. The report noted that the WUTC could conceivably "allow some limited competition" under existing regulations "by declining to require a

certificate for certain types of boat transportation services that are arguably private rather than for public use"—*e.g.*, "a hotel or resort providing transportation services for the exclusive use of its guests, either with its own vehicles or by arranging a 'private charter.'" CP 268, 270. But it added that such an interpretation would have to be shown to not "significantly threaten the regulated carrier's ridership, revenue, and ability to provide reliable and affordable service." CP 271. The report concluded that it is "unlikely" such an interpretation "could be relied upon to authorize competing services on Lake Chelan." CP 268.

E. The Courtneys' Challenge To The Certificate Requirement

In 2011, Jim and Cliff filed a federal constitutional challenge to the PCN requirement in the Eastern District of Washington. CP 86-126. They asserted two claims: that as applied to the provision of boat transportation service on Lake Chelan that is (1) open to the general public or (2) restricted to customers of a specific business or group of businesses, the PCN requirement and corresponding application process abridge their "right to use the navigable waters of the United States," which is protected by the Privileges or Immunities Clause of the 14th Amendment. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873). CP 119, 115.

The district court dismissed both claims. *Courtney v. Goltz*, 868 F. Supp. 2d 1143 (E.D. Wash. 2012) (CP 295-317), *aff'd in part and vacated*

in part, 736 F.3d 1152. Regarding the first (transportation that is open to the general public), it held that the right to use the navigable waters of the United States does not encompass a right "to operate a commercial ferry service open to the public on Lake Chelan." *Id.* at 1151 (CP 311). Regarding the second (transportation for customers of a specific business or group of businesses), it held that the Courtneys lacked standing to bring the claim and that, in any event, abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), was warranted. 868 F. Supp. 2d at 1151-53 (CP 311-17).

The Courtneys appealed to the Ninth Circuit, which, in 2013, affirmed as to their first claim. *Courtney*, 736 F.3d at 1162 (CP 244). As to the second, the Ninth Circuit held that the Courtneys do have standing to litigate it, that *Pullman* abstention was nevertheless warranted, but that dismissal was *not* warranted. *Id.* at 1162-65 & n.6 (CP 245-50). Accordingly, it remanded the case with instructions to retain jurisdiction over the claim. *Id.* at 1165 (CP 250). The district court, in turn, issued an order "retain[ing] jurisdiction over [the Courtneys'] second constitutional claim pending an authoritative construction of the phrase 'for the public use for hire' by the WUTC or the Washington state courts." CP 253.

F. Petition For Declaratory Order

In 2014, the Courtneys petitioned the WUTC for a declaratory

order as to whether the service at issue in their second claim requires a PCN certificate. CP 59. The WUTC declined to enter an order, claiming "the Petition lack[ed] sufficient information" and specifying "operational details" that the petition must contain. CP 384, 385. They included: the ownership of the boat service; the business or group of businesses it would serve; the customers of the businesses it would serve; the reservation system it would use; the routes it would follow and points it would serve; the schedule it would follow; the rates it would charge; and terms of service and customer policies. CP 385, 390-91. Accordingly, in 2015, the Courtneys filed a second petition, setting forth five specific circumstances in which they would operate and requesting a declaration as to the applicability of the PCN requirement to each. CP 45-81.

1. Proposal 1 (Lodging Customers Of The Ranch)

Under the first proposal, the boat service would be owned by Cliff Courtney. CP 60. The business served by the service would be Stehekin Valley Ranch, a rustic ranch with cabins and a lodge house owned by Cliff and his wife, Kerry. CP 60. Use of this service would be limited to lodging customers with reservations for Stehekin Valley Ranch: it would provide transportation to and from Stehekin solely for persons with a reservation for lodging at the ranch. CP 60.

Reservations for transportation would be made either: online

through webervations.com, the online service that Stehekin Valley Ranch uses; or by telephone or email through Stehekin Reservations, the service Stehekin Valley Ranch uses for non-online reservations. CP 60-61. By either method, after reserving lodging at the ranch, customers would have the option of reserving boat transportation to and/or from Stehekin. CP 61.

Because the boat service would be owned by Cliff Courtney, it would have access to reservation records for lodging customers of Stehekin Valley Ranch, as well as those who opted for transportation to and/or from Stehekin. CP 61. Upon boarding, customers would be required to provide a copy of their reservation or proof of identification, which boat staff would confirm against the reservation records. CP 61.

This service would run solely between the federally-owned dock at Stehekin and either the federally-owned dock at Fields Point Landing (a distance of about 34 miles) or Manson Bay Marina (a distance of about 42 miles). CP 61. It would not serve intermediate points. CP 61. Docking permits would be obtained from the U.S. Forest Service, National Park Service, Manson Parks and Recreation District, and/or other agencies, as required. CP 61.

The service would run from Memorial Day weekend through early October on days when lodging customers are scheduled to arrive at or depart from Stehekin Valley Ranch. CP 61. On such days, the boat

would: depart Stehekin at 10:00 a.m.; arrive at Fields Point or Manson Bay at approximately 12:00 p.m.; depart Fields Point or Manson Bay at 12:30 p.m.; and arrive at Stehekin at approximately 2:30 p.m. CP 61.

The fare would be approximately $37.00 one-way or $74.00 round-trip, per person over age 12. Children between two and 12 would pay half the full fare, and children under two would travel for free. CP 61.

The proposed vessel is a 50- to 64-foot, climate-controlled boat, with twin diesel engines capable of a 23-knot cruise; it would be insured, inspected, and certified, as required by law. CP 62. Service terms and policies were attached to the petition for declaratory order. CP 79-81.

2. Proposal 2 (Customers Of Ranch Activities/Lodging)

Under the second proposal, the boat service would be owned by Cliff Courtney. CP 62. The business served by the service would also be Stehekin Valley Ranch. CP 62. Use of the service would be limited to: (1) lodging customers with reservations for Stehekin Valley Ranch; and (2) customers with reservations for other activities the ranch offers. CP 62. For example, the ranch offers kayaking tours operated by the ranch itself and horseback riding excursions originating at the ranch and operated by Stehekin Outfitters, a company co-owned by Cliff's son, Colter. On occasion, persons who are not registered lodging customers of the ranch register for such activities. CP 62. The boat service would

provide transportation to and from Stehekin solely for persons with a reservation for lodging at the ranch or other activities offered there.

Reservations for transportation would be made either: online through webervations.com, the online service that Stehekin Valley Ranch uses for lodging reservations; or by telephone or email through Stehekin Reservations, the service Stehekin Valley Ranch uses for non-online reservations for lodging and other activities. CP 62-63. By either method, after reserving lodging or an activity at the ranch, customers would have the option of reserving boat transportation to and/or from Stehekin. CP 63.

Because the boat service would be owned by Cliff Courtney, it would have access to reservation records for customers of lodging or other activities at Stehekin Valley Ranch, as well as those who opted for transportation to and/or from Stehekin. CP 63. Upon boarding, customers would be required to provide a copy of their reservation or proof of identification, which boat staff would confirm against the reservation records. CP 63.

This service would run solely between the federally-owned dock at Stehekin and either the federally-owned dock at Fields Point Landing or Manson Bay Marina. CP 63. It would not serve intermediate points. CP 63. Docking permits would be obtained from the U.S. Forest Service, National Park Service, Manson Parks and Recreation District, and/or other

agencies, as required. CP 63.

The service would run from Memorial Day weekend through early October on days when lodging or activity customers are scheduled to arrive at or depart from Stehekin Valley Ranch. CP 63. On such days, the boat would run on the same schedule discussed in Proposal 1, above. CP 63. Details concerning the fare, vessel, service terms, and policies would be the same as in Proposal 1. CP 63-64.

3. Proposal 3 (Customers Of Courtney-Family Businesses)

Under the third proposal, the boat service would be owned by Cliff and Jim Courtney. CP 64. The businesses served by this service would be businesses owned by Courtney family members ("Courtney-family businesses"), including: Stehekin Valley Ranch and Stehekin Outfitters, discussed above; Stehekin Log Cabins, a lodging business owned by Jim and Cliff's brother Cragg and his wife; and Stehekin Pastry Company, a bakery and restaurant also owned by Cragg and his wife. CP 64. Use of this service would be limited to customers with reservations for activities or services at Courtney-family businesses. CP 64.

Reservations for transportation would be made either: online through webervations.com, the online service that Stehekin Valley Ranch uses for lodging reservations; or by telephone or email through Stehekin Reservations, the service that Stehekin Valley Ranch, Stehekin Outfitters,

Stehekin Log Cabins, and Stehekin Pastry Company use for non-online reservations. CP 64. By either method, after reserving a service or activity at a Courtney-family business (*e.g.*, lodging at Stehekin Valley Ranch or Stehekin Log Cabins; camping, hiking, or horseback riding with Stehekin Outfitters; dining at Stehekin Pastry Company), customers would have the option of reserving boat transportation to and/or from Stehekin. CP 64-65.

Because the boat service would use the same reservation services that Courtney-family businesses already use for lodging and other activities, the boat service, with permission of the Courtney-family businesses, would have access to reservation records for customers of the Courtney-family businesses, as well as those who opted for transportation to and/or from Stehekin. CP 65. Upon boarding, customers would be required to provide a copy of their reservation or proof of identification, which boat staff would confirm against the reservation records. CP 65.

This service would run between the federally-owned dock at Stehekin and either the federally-owned dock at Fields Point Landing or Manson Bay Marina. CP 65. It would serve other points on the lake as needed by Courtney-family businesses. CP 65. For example, it might transport customers of Stehekin Outfitters to other points in connection with hiking or camping trips for which they have reservations. Stops at such points might be made as: (1) intermediate stops in route between

Stehekin and either Fields Point or Manson Bay; or (2) standalone trips. CP 65. Docking permits would be obtained from the U.S. Forest Service, National Park Service, Manson Parks and Recreation District, and/or other agencies, as required. CP 65.

The service would run from Memorial Day weekend through early October on days when Courtney-family business customers are scheduled to arrive at or depart from Stehekin. CP 65. On such days, the boat would run on the same schedule discussed in Proposal 1; any intermediate stops would be made in route and any standalone trips would be made as needed by Courtney-family businesses. CP 65-66.

The fare would be approximately $37.00 one-way or $74.00 round-trip between Stehekin and either Fields Point or Manson Bay, per person over age 12. Children between two and 12 would pay half the full fare; children under two would travel free. CP 66. Fares for intermediate stops or standalone trips would be less and based on distance traveled. CP 66. Details concerning the vessel, as well as service terms and policies, would be the same as in Proposal 1. CP 66.

4. Proposal 4 (Customers Of Stehekin-Based Businesses)

Under the fourth proposal, the boat service would be owned by Cliff and Jim Courtney. CP 66. The businesses served by this service would be Stehekin-based businesses (including, but not limited to,

Courtney-family businesses) that desire to use the service to provide transportation for their registered customers. CP 66. Use of the service would be limited to customers with reservations for activities or services at these Stehekin-based businesses. CP 66.

Participating Stehekin-based businesses would be required to use webervations.com in taking on-line reservations and Stehekin Reservations in taking reservations by phone or email. CP 66. By either method, after making a reservation at a participating Stehekin-based business, customers would have the option of reserving boat transportation to and/or from Stehekin. CP 66-67.

Because it would also use webervations.com and Stehekin Reservations, the boat service, with permission of the participating Stehekin-based businesses, would have access to reservation records for customers of the Stehekin-based businesses, as well as those customers who opted for transportation to and/or from Stehekin. CP 67. Upon boarding, customers would be required to provide a copy of their reservation or proof of identification, which boat staff would confirm against the reservation records. CP 67.

This service would run between the federally-owned dock at Stehekin and either the federally-owned dock at Fields Point Landing or Manson Bay Marina. It would serve other points on the lake as needed by

participating Stehekin-based businesses to provide transportation in connection with activities or services for which their customers have made reservations. CP 67. Stops at such points might be made as: (1) intermediate stops in route between Stehekin and either Fields Point or Manson Bay; or (2) standalone trips. CP 67. Docking permits would be obtained from the U.S. Forest Service, National Park Service, Manson Parks and Recreation District, and/or other agencies, as required. CP 67.

The service would run from Memorial Day weekend through early October on days when participating Stehekin-based business customers are scheduled to arrive at or depart from Stehekin. On such days, the boat would run on the same schedule discussed in Proposal 1; any intermediate stops would be made in route and any standalone trips would be made as needed by the Stehekin-based businesses. CP 67-68.

The fare would be approximately $37.00 one-way or $74.00 round-trip between Stehekin and either Fields Point or Manson Bay, per person over age 12. Children between two and 12 would pay half the full fare; children under two would travel free. CP 68. Fares for intermediate stops or standalone trips would be less and based on distance traveled. CP 68. Details concerning the vessel, as well as service terms and policies, would be the same as in Proposal 1. CP 68.

5. Proposal 5 (Charter By Travel Company)

Under the fifth proposal, the boat service would be owned by Cliff and Jim Courtney. CP 68. The business served by this service would be a Stehekin-based travel company that organizes travel packages for Stehekin visitors; packages would include lodging, meals, and/or other activities or services with Stehekin-based businesses. CP 68. The travel company would not be owned by Cliff, Jim, or other Courtney family members. CP 68. Use of this service would be limited to customers who have purchased a package from the Stehekin-based travel company. CP 68.

Customers of the Stehekin-based travel company would purchase packages directly from the company, which, in turn, would charter transportation for the customers by private charter agreement with the boat service. CP 69. The travel company would provide the boat service a manifest of customers for whom it has chartered transportation. CP 69. Upon boarding, customers would be required to provide proof of identification, which boat staff would confirm against the manifest. CP 69.

This service would run between the federally-owned dock at Stehekin and either the federally-owned dock at Fields Point Landing or Manson Bay Marina. It would serve other points on Lake Chelan as needed by the travel company to provide transportation in connection with packages its customers have purchased. CP 69. Docking permits would

be obtained from the U.S. Forest Service, National Park Service, Manson Parks and Recreation District, and/or other agencies, as required. CP 69.

The service would run from Memorial Day weekend through early October on days and at times[3] when the travel company's customers are scheduled to arrive at or depart from Stehekin. CP 69. Intermediate stops between Stehekin and Fields Point or Manson Bay, as well as standalone trips to other points on Lake Chelan, would be made as needed by the travel company in connection with travel packages it has sold. CP 69.

The boat service would charge the travel company approximately $37.00 one-way or $74.00 round-trip between Stehekin and either Fields Point or Manson Bay for each customer over age 12 that it transports. It would charge the travel company half that amount per child between two and 12 and would not charge the travel company for children under two. CP 69-70. The boat service would charge the company for intermediate stops or standalone trips at a lesser amount based on distance traveled. CP 70. Details concerning the vessel, as well as service terms and policies, would be the same as in Proposal 1. CP 70.

G. Proceedings On Petition For Declaratory Order

The WUTC staff, Lake Chelan Boat Company (*i.e.*, the incumbent certificate holder and lone ferry operator on Lake Chelan since 1929), and

[3] The times would not necessarily be set, as the Declaratory Order suggests. *See* CP 429.

Arrow Launch Service, Inc. (another commercial ferry operator and certificate holder not operating on Lake Chelan) submitted responsive filings to the Courtneys' petition for declaratory order. They argued that the Courtneys should not be allowed to operate any of the services they had proposed, CP 405-06, or that they should be forced to go through the PCN process for each of the services, CP 403, 408-13.

The WUTC heard argument on the Courtneys' petition in October 2015. CP 426, 442-512.[4] Reiterating points they had made in their petition, the Courtneys asserted that: (1) the plain language of the relevant statute does not require a PCN certificate for their proposals, as providing boat transportation solely for customers with a preexisting reservation for services or activities at a specific lodging facility or another Courtney-family or Stehekin-based business is not operating that boat "for the public use for hire"; (2) history and case law make clear that such transportation is neither a public ferry nor common carrier; and (3) the WUTC does not require a PCN certificate for similar transportation services. CP 450-56.

H. Declaratory Order

The WUTC issued its Declaratory Order in November 2015. CP 429-39. It began by explaining that "[t]he sole issue is whether th[e] proposed operations would be 'for the public use for hire' as that phrase is

[4] The Courtneys, WUTC staff, Arrow Launch Service, and Lake Chelan Boat Company participated, but the petition was not handled as an adjudicative proceeding. CP 449.

used in" RCW 81.84.010(1), in which case they would require a PCN certificate. CP 432 (¶ 10). "The legislature did not define 'for the public use for hire,'" it noted, "and no Washington court has interpreted the meaning of that phrase . . . . Nor has the Commission." CP 432 (¶ 11).

The WUTC acknowledged that the Courtneys' proposed services "would be 'solely for customers with a preexisting reservation for services or activities at a specific lodging facility or other Courtney-family or Stehkein-based business.'" CP 433 (¶ 13). Nevertheless, it concluded the services would be "for the public use for hire"—and, thus, require a PCN certificate—because "[a]ny member of the public may reserve lodging or other . . . services or products at these businesses." CP 433 (¶ 13).

The WUTC recognized that, in the auto transportation context, it exempts services comparable to those the Courtneys proposed—specifically, "persons operating hotel buses, private carriers who transport passengers as an incidental adjunct to another private business, and transportation of airline flight crews and in-transit passengers between an airport and temporary hotel accommodations." CP 434 (¶ 15) (citing WAC 480-30-011(g), (i) & (j)). It claimed, however, that these exemptions "derive from . . . legislative directive" and that a similar directive does not exist in the waterborne context. CP 435 (¶ 17).

Finally, the WUTC acknowledged that it "has exempted 'charter

services' from the commercial ferry [PCN] requirement," which the legislature did not direct. CP 436 (¶¶ 18, 19). It nevertheless found the Courtneys' fifth proposal—under which a Stehekin-based travel company would charter transportation, from the Courtneys, for customers who had purchased packages from the travel company—was not a "charter service" because it would have a "public character." CP 436 (¶ 20).

The WUTC concluded that "[e]ach of the five proposed services described in the [Courtneys'] Petition requires the operation of a vessel 'for the public use for hire' under RCW 81.84.010(1)." CP 439 (¶25). It thus ordered that the Courtneys "may not operate any vessel or ferry on Lake Chelan to provide any of the five services they describe . . . without first applying for and obtaining . . . a certificate declaring that public convenience and necessity require such operation." CP 439 (¶27).

I. Judicial Review

The Courtneys petitioned for judicial review of the Declaratory Order in Chelan County Superior Court, which, in January 2017, filed a memorandum opinion holding that each of their five proposals involved transportation "for the public use." CP 741-50. On February 6, 2017, the court entered final judgment affirming the Declaratory Order. CP 735-39.

VI. STANDARD OF REVIEW AND APA STANDARDS

In judicial review proceedings, this Court "sit[s] in the same

position as the superior court and appl[ies] the APA standards directly to the administrative record." *Campbell v. State Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014). "Thus, the decision [the Court] review[s] is that of the agency" (*i.e.*, the Declaratory Order), "not of . . . the superior court." *Id.* Under the APA, the Declaratory Order must be set aside if it is: (1) "[o]utside the statutory authority of" the WUTC; or (2) "[a]rbitrary or capricious." RCW 34.05.570(4)(c)(ii), (iii). Both inquiries are questions of law that this court examines de novo. *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994); *Wash. Indep. Tel. Ass'n v. WUTC*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003).

VII. ARGUMENT

The Courtneys are entitled to their requested relief for two reasons. First, the Declaratory Order is "[o]utside the statutory authority of the [WUTC]," RCW 34.05.570(4)(c)(ii), because it requires a PCN certificate for transportation services that the Legislature did not subject to the PCN requirement. Second, the Declaratory Order is "[a]rbitrary [and] capricious," RCW 34.05.570(4)(c)(iii), because it imposes the PCN requirement on the Courtneys' proposed services even though the WUTC exempts similarly-situated services from the PCN requirement.

A. The Declaratory Order Exceeds The WUTC's Authority

The WUTC's conclusion that the PCN requirement applies to the

Courtneys' proposed services is "[o]utside the statutory authority of the agency." RCW 34.05.570(4)(c)(ii). An agency "exceed[s] its scope of authority" when it "expands the meaning of terms in" a statute "in a manner that is not consistent with the statute" itself. *Wash. State Hosp. Ass'n v. Wash. State Dep't of Health*, 183 Wn.2d 590, 597, 353 P.3d 1285 (2015). Here, the WUTC did just that: the relevant statute requires a PCN certificate only for service that is "for the public use," RCW 81.84.010(1), but the WUTC expanded it to encompass purely private transportation.

The WUTC's interpretation is wrong for three reasons. First, the plain meaning of "for the public use" does not encompass service restricted to confirmed customers of a particular business or group of businesses. Moreover, case law and history make clear that such service is neither a public ferry nor a common carrier. And given the abhorrence of monopolies expressed in the Washington Constitution, the WUTC may not, in the absence of an express, legislative grant of power, confer on Lake Chelan Boat Company the exclusive right to provide such service.

1. The Proposed Services Are Not For The "Public Use"

The plain language of the relevant statute does not authorize the WUTC to require a PCN certificate for the type of boat transportation the Courtneys propose. The statute provides that a "commercial ferry may not operate any vessel or ferry for the *public use* for hire between fixed

termini or over a regular route upon the waters within [Washington] . . . without first applying for and obtaining from the [WUTC] a certificate declaring that public convenience and necessity require such operation." RCW 81.84.010(1) (emphasis added). Boat transportation solely for customers with a preexisting reservation for services or activities at Stehekin Valley Ranch or another Courtney-family or Stehekin-based business is not for the "public use"; nor is boat transportation by charter agreement with a travel company solely for customers who have purchased travel packages from that travel company.

Given that such transportation is not, by any commonsense understanding, for the "public use," the WUTC engaged in linguistic gymnastics to bring the Courtneys' proposals within the term's reach. It relied on the *fourth*-listed definition of "public" in *Webster's Third New International Dictionary*—"accessible to or shared by all members of the community"—then cherry-picked self-serving language from two of the same source's alternative definitions of "community" to conclude that *that* term—which appears nowhere in the PCN statute—means "a body of individuals . . . linked by common interests." CP 432-33 (¶ 11 & nn.2, 3) (quoting *Webster's Third New International Dictionary* 460, 1836 (G&C Merriam Co. 1976)). The WUTC then concluded that "the Courtneys' propose to operate just such a service," because it would serve "members

of a group with common interests, *i.e.*, customers of various businesses located in and around Stehekin." CP 433 (¶ 12). This self-serving, patwork approach is no way to interpret a statute.

In fact, the WUTC was selective not just in what it chose to rely on from *Webster's Third New International Dictionary*, but also in choosing that source in the first place. The Declaratory Order acknowledges—in a buried footnote—that "the Oxford English Dictionary defines 'public'" differently, "as 'open to or shared by all people.'" CP 433 (¶ 11 n.2). This commonsense definition would plainly *not* encompass the Courtneys' services, which is precisely why the WUTC chose to ignore it.

Worse, in interpreting a legal term, the WUTC did not even consult *Black's Law Dictionary*, which defines "public" in similarly straightforward fashion: "Open or available for all to use, share, or enjoy." *Black's Law Dictionary* 1422 (10th ed. 2014). Although courts "typically ascertain plain meaning from standard English dictionaries," the Washington Supreme Court has stressed that "it is helpful to examine legal dictionaries when words are used in a legal context." *Citizens All. for Prop. Rights Legal Fund v. San Juan Cty.*, 184 Wn.2d 428, 443, 359 P.3d 753 (2015). In fact, that court was recently called upon to interpret the term "public" as used in Washington's recreational use statute, which, in certain circumstances, provides immunity from suit to landowners who

open their land to the public. *See Cregan v. Fourth Mem'l Church*, 175 Wn.2d 279, 283, 285 P.3d 860 (2012). The court thus had to decide whether the landowner in the case had opened his land for "public" or, rather, "private use." *Id.* at 285. Noting that "[w]here a term is undefined, we apply the plain meaning of the word and may consult a dictionary," the court looked exclusively to *Black's Law Dictionary* and held that "'[p]ublic' means '[o]pen or available for all to use, share, or enjoy.'" *Id.* (quoting *Black's Law Dictionary* 1348 (9th ed. 2009) (second alteration in original)). Because the landowner had provided only "a selective invitation to enter the land" and had "restrict[ed] the users" of it, the court held the land was not open to the "public." *Id.* at 286. For the same reason, the Courtneys' proposed services are not public.

The Declaratory Order's contrary interpretation cannot be squared with precedent concerning "public use" as it relates to the WUTC's regulatory jurisdiction. As the Washington Supreme Court held in *West Valley Land Co. v. Nob Hill Water Association, Inc.*, 107 Wn.2d 359, 729 P.2d 42 (1986), "[t]he test used to determine if a corporation is to be regulated by the [W]UTC . . . is whether or not the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be served by the utility; or whether, on the contrary, it merely offers to serve only particular

individuals of its own selection." *Id.* at 365 (internal quotation marks and citation omitted). Applying that test, the court held that a water company was not subject to WUTC regulation because it "ha[d] not dedicated or devoted its facilities to public use, nor ha[d] it held itself out as serving, or ready to serve, the general public." *Id.* at 366. Although the company would "provide water service to any property within its service area upon request and without discrimination" so long as the property owner paid the requisite fees and the service was technically feasible, the "criteria for service [were] set forth by" the company. *Id.* at 367. Thus, the court concluded, the company "ha[d] chosen to serve particular individuals of its own selection, and d[id] not serve the public as a class or that portion of it that could be served by [the company]." *Id.*[5]

The same is true here. The Courtneys do not propose to dedicate or devote their boat to public use, nor to hold it out as serving the general public. Rather, they have set forth strict criteria for their services, and they would service only those individuals who meet those criteria. Such service is not "for the public use" and is not subject to a PCN certificate.

In insisting otherwise, the WUTC reasoned that because "[a]ny member of the public may reserve lodging or other unspecified services or

[5] *See also McCarthy v. Pub. Serv. Comm'n*, 111 Utah 489, 493, 184 P.2d 220 (1947) ("The defendants are rendering a private service to their customers. They are not engaged in a public service inviting an indefinite public generally to hire them; nor does the public have a legal right to the use of their facilities.").

products at the[] businesses" that would be served by the Courtneys, the service would have a "public nature." CP 433 (¶ 13). The WUTC misses the point: that anyone *could* be a customer of Stehekin Valley Ranch (or another participating business) does not change the fact that boat transportation would be restricted to those who *are* customers.

Moreover, that Stehekin Valley Ranch (or any other business that would be served) is open to the public is utterly irrelevant. The PCN requirement does not apply to lodging establishments, and the WUTC is not empowered to regulate them.[6] The question is whether the boat transportation service itself—that is, the thing that the WUTC actually *does* regulate—is open to the public. Plainly it is not. Concluding otherwise would give the WUTC a roving jurisdiction over virtually every boat that is in any way connected to some other business that is open to the public. This Court should reject any interpretation that so radically expands the WUTC's jurisdiction into areas the Legislature never entrusted to it. *Cf. Cole v. WUTC*, 79 Wn.2d 302, 306, 485 P.2d 71 (1971) (holding the WUTC "ha[s] no authority to consider the effect of a regulated utility upon a . . . business" that is not "within the jurisdictional concern of the commission").

Yet even if it *were* relevant that "any member of the public" may

[6] RCW 70.62 (charging Department of Health with regulating lodging establishments).

patronize Stehekin Valley Ranch, a hotel, even though open to the public, is not a "public use" under Washington law. *Miller v. City of Tacoma*, 61 Wn.2d 374, 397, 378 P.2d 464 (1963) ("[T]he building of . . . hotels, and other similar enterprises, . . . lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings." (internal quotation marks and citation omitted)).[7] Nor, for that matter, are retail establishments, restaurants, and similar businesses. *In re City of Seattle*, 96 Wn.2d 616, 629, 633-34, 638 P.2d 549 (1981). It is perverse to suggest that, although a hotel is not a "public use," transportation for the exclusive use of its customers is "*for* the public use."[8]

Finally, the WUTC's reliance on *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 36 S. Ct. 583, 60 L. Ed. 984 (1916), to support its conclusion is unavailing. Although *Terminal Taxicab* held that a taxi company providing service for guests at various hotels in the District of Columbia was a "common carrier," there were several critical factors that

[7] *See also HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 616 n.1, 639, 121 P.3d 1166 (2005) (distinguishing condemnation for monorail station from "condemnation . . . to build a private hotel" and stating that only the former "involves one of the most fundamental public uses for which property can be condemned").

[8] Although the cases cited in this paragraph concern "public use" in connection with eminent domain, they may inform this Court's interpretation of the term in connection with ferries, because "[t]he public nature of a ferry franchise carries with it the right to secure a landing place by eminent domain." 35A Am. Jur. 2d *Ferries* § 27 (footnote omitted); *see also* Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 Mich. St. L. Rev. 877, 902 (2004) (noting 19th-century courts authorized eminent domain to benefit "common carriers," including ferries, because "common carriers [had] a duty of access to the public" that "ensured that the public 'use[d]' the property").

led to that conclusion—factors that are absent here.

First, in *Terminal Taxicab*, the company providing the transportation did not own the hotels. In the Courtneys' first and second proposals, by contrast, Cliff Courtney, owner of Stehekin Valley Ranch, would own the transportation service to the ranch. And in the third proposal, Jim and Cliff would both own the transportation service and operate solely for businesses owned by their family members. This alone takes the services out of the realm of a common carrier subject to the PCN requirement. *Cf. State ex rel. Silver Lake Ry. & Lumber Co. v. Pub. Serv. Comm'n*, 117 Wash. 453, 458-59, 201 P. 765 (1921) (holding railroad company was not a common carrier where it "was organized for the purpose of getting out timber owned by the persons organizing it").

Second, there appears to have been no requirement that customers in *Terminal Taxicab* prove they were guests of any of the various hotels. Under the Courtneys' proposals, by contrast, "[a]t the time of boarding, customers would be required to provide a copy of their reservation or proof of identification, which boat staff would confirm against existing reservation records," or, in Proposal 5, "against the manifest" provided by the travel company. CP 61, 63, 65, 67, 69.

Third, in *Terminal Taxicab*, the taxi company's contracts with the hotels afforded it the "right to solicit in and about the hotel[s]" and take

hotel guests *wherever* they wished to go; in fact, the taxi company could not "refuse to carry a guest upon demand." *Terminal Taxicab Co.*, 241 U.S. at 254-55. That is unlike the services the Courtneys propose, the first two of which "would run solely between the federally-owned dock at Stehekin and either the federally-owned dock at Fields Point Landing . . . or the Manson Bay Marina" and "would not serve intermediate points." CP 61, 63. The remaining three proposals would likewise "run between the federally-owned dock at Stehekin and either the federally-owned dock at Fields Point Landing . . . or the Manson Bay Marina." CP 65, 67, 69. Although they "would also serve other points on Lake Chelan," they would do so *not* as solicited by passengers, as in *Terminal Taxicab*, but rather: "as needed by Courtney-family businesses" in Proposal 3, CP 65; "as needed by the participating Stehekin-based businesses to provide transportation in connection with the activities or services for which their customers have made reservations" in Proposal 4, CP 67; and "as needed by the travel company to provide transportation in connection with the packages its customers have purchased" in Proposal 5, CP 69. In short, a private business, not passengers, would determine if there were any stops.

Finally, in addition to providing service to guests at various hotels, the taxi company in *Terminal Taxicab* provided service "to all persons passing to or from trains in . . . Union Station." *Terminal Taxicab Co.*,

241 U.S. at 254. The Courtneys would not offer any comparably public service. In short, *Terminal Taxicab* is neither binding nor instructive here.

In the end, the Declaratory Order contravenes the plain meaning of the statute it purports to apply. It expands the requirement for a PCN certificate far beyond what the Legislature called for and is thus "[o]utside the statutory authority of the agency." RCW 34.05.570(4)(c)(ii).

2. History And Case Law Make Clear That The Proposed Services Are Not A Public Ferry Or Common Carrier

Case law and history confirm that the Courtneys' proposed boat services are neither a public ferry nor a common carrier. Historically, a public ferry was one that was "open to all," had an "established" and "[r]egular fare," and, as a "common carrier," was "bound to take over all who c[a]me." *Futch v. Bohannon*, 134 Ga. 313, 315, 67 S.E. 814 (1910) (internal quotation marks omitted). Simply put, "ferry-men" were "under a public duty to transport . . . all persons." *Puget Sound Navigation Co. v. Dep't of Pub. Works*, 156 Wash. 377, 383, 287 P.2d 52 (1930) (quoting *Mayor of New York v. Starin*, 106 N.Y. 1, 11, 12 N. E. 631 (1887)); *see also United Truck Lines v. United States*, 216 F.2d 396, 398 (9th Cir. 1954) (noting a public ferry is one that "extends its services to all comers"). Transportation for one's self, goods, employees, and customers, if a ferry at all, was a *private* ferry and did not require a government

franchise. *See Futch*, 134 Ga. at 315; *Meisner v. Detroit, Belle Isle & Windsor Ferry Co.*, 154 Mich. 545, 548-49, 118 N.W. 14 (1908); *Self v. Dunn & Brown*, 42 Ga. 528, 531 (1871).

For example, in *Meisner*, the owner of an amusement park located on an island used boats to transport customers to and from the park. *Meisner*, 154 Mich. at 547-48. The Michigan Supreme Court held that provision of such transportation was not the operation of a common carrier because "[t]he ride upon the boat and the use of the grounds [we]re part of the same scheme for pleasure furnished by the defendant to those whom it may choose to carry." *Id.* at 549.

Similarly, in *Self*, mill owners provided their customers boat transportation to and from the mill. *Self*, 42 Ga. at 531. The Georgia Supreme Court held that such boat transportation was "an appendage to the mill"—an "accommodation of the mill-owner to his customers"—and, thus, a "private ferry," rather than a common carrier. *Id.* at 530, 531.

The WUTC attempted to distinguish these cases, but the distinctions are unavailing. For example, it noted that in *Self*, "the mill did not receive compensation for the ferry service" it provided its customers. CP 438 (¶ 24 n.22); *see also id.* (noting that *Futch* "did not involve payment for passage"). Yet case law is clear that "[a] private ferry . . . may take pay for ferriage." *United Truck Lines*, 216 F.2d at 398; *Futch*,

134 Ga. at 315 (same). As *Meisner* held, it is irrelevant whether the person operating a private ferry in connection with a business separately "charg[es] for transportation to" the business or, rather, "exact[s]" the cost of transportation at the business itself. *Meisner*, 154 Mich. at 549.

The WUTC also attempted to distinguish *Self* and *Meisner* on the ground that they did not concern the "right to operate" boat services, but rather the duty of care owed, or obligation to carry, customers on the boats. CP 438 (¶ 24 n.22). The WUTC ignored that the duty of care owed, or obligation to carry, turned entirely on whether the services were a public ferry—*i.e.*, a common carrier. *See Self*, 42 Ga. at 530 ("A carrier is bound to ordinary diligence. A common-carrier . . . must use extraordinary diligence."); *Meisner*, 154 Mich. at 547 ("Is the defendant . . . a public common carrier of passengers, obliged by law to accept any person who offers himself as a passenger? This is the important question in this suit."). The courts concluded they were not.

Even non-boat transportation cases make clear that services like the Courtneys' are not common carriers subject to a PCN requirement. In *State ex rel. Public Utilities Commission v. Nelson*, 65 Utah 457, 238 P. 237 (1925), the Utah Supreme Court held that bus transportation service between Salt Lake City and a camp ground (located, akin to this case, in a national forest) did not require a PCN certificate. The company operating

the camp contracted with a bus company to make two round trips per day to carry customers to and from the camp. *Id.* at 460. Like Lake Chelan, a canyon highway was the "only accessible pass to and from the camp." *Id.* "With a few exceptions, [the bus company] transported no persons except those who were guests and entitled to privileges of the camp, and all persons transported . . . were required to produce or procure tickets from the [camp company] entitling them to such transportation." *Id.*

Utah's Public Utilities Commission maintained that the bus company transporting the campers "was a common carrier" and that "to lawfully carry on such operations [it] was required to have a certificate from the commission." *Id.* at 461. The court disagreed. *Id.* at 464. It held that "a common or public carrier is one who, by virtue of his business or calling or holding out, undertakes for compensation to transport persons or property, or both, from one place to another for all such as may choose to employ him," and that "the dominant element [is] of public service, serving and carrying all persons indifferently who apply for passage." *Id.* at 461-62. The bus company was not such a carrier:

> It is clear the [bus company] did not hold [it]self out to carry, nor was . . . engaged in carrying, any and all persons who desired to travel up and down the canyon or go from place to place, or property of all persons indifferently. No one except guests of the camp or connected with it and holding a ticket from the [camp company] had a right to demand of the [bus company] transportation either of

> person or property. . . . [T]he [bus company] was not a common carrier nor operating a public utility.

Id. at 464. The same reasoning dictates the same conclusion here.

3. The Washington Constitution's "Abhorrence Of Monopolies" Precludes An Interpretation That Applies The PCN Requirement To The Proposed Services

Finally, given the abhorrence of monopolies expressed in the Washington Constitution, the WUTC may not, in the absence of an express legislative grant of power, confer on Lake Chelan Boat Company, or any carrier, the exclusive right to provide boat transportation on Lake Chelan for customers of a specific business or a group of businesses.

In *In re Electric Lightwave*, for example, the WUTC issued orders conferring exclusive rights to service areas on local telephone companies. Other telephone companies petitioned for judicial review, arguing that the WUTC lacked statutory authority to grant the exclusive rights. *In re Electric Lightwave*, 123 Wn.2d at 535-37. The court began its analysis by stressing that "[a]n agency possesses only those powers granted by statute." *Id*. at 536. It then noted that the Washington Constitution, including Article XII, § 22, "manifest[s] the state's abhorrence of monopolies" and thus held that where a "statute [is] ambiguous, our state constitution makes it inappropriate to impute . . . a conferral of authority on the Commission to grant monopolies." *Id.* at 537, 538. The court thus

"forb[a]d[e] the Commission from legally conferring on any" local telephone company "the right to be the exclusive provider of telecommunications services in a given exchange." *Id.* at 542.

Similarly, in *Davis & Banker, Inc. v. Metcalf*, 131 Wash. 141, 229 P. 2 (1924), the court held that a company that contracted with a creamery to transport the creamery's goods did not require a PCN certificate. *Id.* at 144. "[W]e do not believe that it was the intention of the Legislature" to require a certificate, the court noted, and "this court should be slow to hold . . . that the statute was intended to enable one to obtain and hold such an exclusive monopoly for the carriage of passengers and merchandise over the public highways of the state as to exclude the owners thereof from carrying themselves or their goods or property, either personally, or by agent, or by an independent contract." *Id*. This Court should be equally slow to hold that a PCN certificate is required of the Courtneys.

B. The Declaratory Order Is Arbitrary And Capricious

The Declaratory Order should be set aside for another, independent reason: it is arbitrary and capricious. "Agencies may not treat similar situations in different ways." *Seattle Area Plumbers v. Wash. State Apprenticeship & Training Council*, 131 Wn. App. 862, 879, 129 P.3d 838 (2006). Here, however, the WUTC's own regulations exempt from the PCN requirement substantively identical transportation services in the

non-waterborne context, as well as waterborne "charter service," which is precisely the type of service in the Courtneys' fifth proposal.

1. The WUTC Exempts Similar Non-Waterborne Services

Like ferries, auto transportation companies must obtain a PCN certificate. WAC 480-30-086(1). Yet the WUTC exempts the following services, analogous to those the Courtneys propose, from the requirement:

- "Persons owning, operating, controlling, or managing . . . hotel buses";
- "Private carriers who, in their own vehicles, transport passengers as an incidental adjunct to some other established private business owned or operated by them in good faith"; and
- "Transporting transient air flight crew or in-transit airline passengers between an airport and temporary hotel accommodations under an arrangement between the airline carrier and the passenger transportation company."

WAC 480-30-011(6), (8), (9). It is arbitrary and capricious to require a PCN certificate of the Courtneys but not of these comparable services.

The WUTC excused this arbitrary treatment by insisting that the exemptions in the auto transportation context "derive from legislative directive." CP 435 (¶ 17). Yet only the "hotel bus" exemption was directed by the Legislature. *See* RCW 81.68.015. The others reflect the WUTC's *interpretation* of the auto transportation statutes to not reach certain private transportation services—namely, transportation adjunct to another businesses and transportation arranged by airlines for their

customers. The WUTC's refusal to adopt a similar interpretation for similar waterborne services is utterly arbitrary.

In fact, the statutory definition of "auto transportation company" and the statute requiring such companies to obtain a PCN certificate do not even contain a "public use" qualification. In other words, the PCN requirement applies to such companies regardless of whether they operate "for the public use," and yet the WUTC *still* exempts private services. But when it comes to ferries, which require a PCN certificate *only* if they operate "for the public use," the WUTC demands a certificate for the same types of private services. The WUTC gets it precisely backwards. *See Holmes v. R.R. Comm'n*, 197 Cal. 627, 636, 637, 242 P. 486 (1925) (distinguishing a PCN statute applicable to "service[s] . . . performed for . . . the public" from one with no such qualification and holding that the latter applied to "private carriers" even though the former did not).

The WUTC certainly *could have* interpreted "public use" in a way that did not reach the Courtneys' services. As it acknowledged, it has previously exempted services from the ferry PCN requirement without legislative authorization. CP 436 (¶¶ 18, 19) (noting "the Commission has exempted 'charter services'" even though "[t]he legislature did not create an exemption . . . for 'charter service'"); *see also* CP 268 (noting WUTC can "allow some limited competition" on Lake Chelan under existing

"statutory framework" by "declining to require a certificate for certain types of boat transportation services that are arguably private rather than for public use"). Nevertheless, it required a certificate of the Courtneys.

Moreover, that the "hotel bus" exemption *is* statutorily mandated does not change the fact that it is arbitrary to treat the Courtneys' analogous service differently. In *Smith v. Cahoon*, 283 U.S. 553, 51 S. Ct. 582, 75 L. Ed. 1264 (1931), for example, the Court held that a statute requiring a PCN certificate for auto transportation companies was "wholly arbitrary" because it exempted some private carriers, including "hotel buses," but not others. *Id.* at 557, 567; *see also id.* at 566 (noting statute distinguished not "between common carriers and private carriers, but between private carriers themselves"). The Washington Supreme Court cited *Smith* approvingly in *State ex rel. Department of Public Works v. Inland Forwarding Corp.*, 164 Wash. 412, 2 P.2d 888 (1931), holding, under the state constitution, that although a PCN statute that distinguished between "common carriers" and "private carriers" was "reasonable," a distinction "providing for the regulation of some private carriers while others [a]re left alone" would be "an arbitrary classification." *Id.* at 422-23, 425. Yet that is the very distinction the WUTC drew here.

2. Charter Service

In the ferry context specifically, moreover, the WUTC exempts

"[c]harter services" from the PCN requirement. WAC 480-51-022(1). This is the very type of service in the Courtneys' fifth proposal, yet the WUTC required a certificate. This, too, was arbitrary and capricious.

The WUTC's commercial ferry regulations define "charter service" as "the hiring of a vessel, with captain and crew, by a person or group for carriage or conveyance of persons or property." WAC 480-51-020(14). The Courtneys' fifth proposal is such a service: customers of a Stehekin-based travel company would purchase packages directly from the travel company, which would then charter transportation for the customers by private charter agreement with Jim and Cliff's boat service. CP 68-69.

In insisting the Courtneys' fifth proposal was *not* exempt, however, the WUTC ignored the definition of "charter service" in the regulations governing ferries and looked instead to the definition of "charter *carrier*" in the regulations governing automotive passenger transportation companies. *See* CP 436 (¶ 19 & n.17). Relying on an inapplicable term, which appears nowhere in the statutes and regulations governing ferries, rather than on the actual *controlling* term, was arbitrary and capricious. *See Byars v. Coca-Cola Co.*, No. 1:01-CV-3124-TWT, 2006 WL 2523095, at *6 (N.D. Ga. Aug. 28, 2006) (holding that it was "arbitrary and capricious" to rely on an incorrect, "much more demanding" definition to justify denying disability benefits), *aff'd in part*

and vacated in part on other grounds, 517 F.3d 1256 (11th Cir. 2008).[9]

But even if the definition of "charter carrier" could have properly informed the WUTC's interpretation of the term "charter service," the Courtneys' fifth proposal *still* should have been absolved of the PCN requirement. Consistent with the definition of "charter carrier," the proposed service would involve: (1) "transportation of a group of persons" (customers who have purchased a travel package from a Stehekin-based travel company); (2) who, "pursuant to a common purpose[,] . . . travel together as a group to a specified destination or for a particular itinerary" (the passengers would travel for the common purpose of partaking in the recreational activities offered in Stehekin and the travel package itinerary); (3) "under a single contract" (the travel company would contract for transportation for the group of customers by private charter agreement with the Courtneys). WAC 480-30-036(2).

In arguing otherwise, the WUTC relied on a dissenting opinion from an Oregon Court of Appeals case, *Iron Horse Stage Lines, Inc. v. Public Utilities Commission*, 125 Or. App. 671, 866 P.2d 516 (1994). *See* CP 437 (¶ 22). That opinion, however, undermines the WUTC's position.

[9] A copy of *Byars* is included in the accompanying appendix. Underscoring the inapplicability of the term "charter carrier," the definition of that term is prefaced by the qualification that it applies "*unless* . . . a rule states otherwise." WAC 480-30-036(2) (emphasis added). The WUTC's rules do state otherwise: the definition of "charter *service*" in the ferry regulations is prefaced by the instruction that, "[f]or the purposes of these rules, the following definitions *shall* apply." WAC 480-51-020 (emphasis added).

The case involved an arrangement similar to that in the Courtneys' fifth proposal: a travel broker signed up passengers for bus service between Eugene and the Willamette Pass ski area and then contracted with bus companies to provide the transportation. 125 Or. App. at 673-74. The WUTC's Oregon counterpart agency had determined that the arrangement was a "charter service" under Oregon's definition of that term, which, like the requirement in Washington's "charter carrier" definition that the group have a "common purpose," required that the group have a "common trip purpose." *Id.* at 677 (Muniz, J., dissenting) (quoting Or. Rev. Stat. § 767.005(5)). According to the agency, there was a "common trip purpose" because "[t]he charter groups were comprised of individuals, brought together under the auspices of a licensed broker, who sought to ski or to otherwise use the destination recreational facilities available at . . . Willamette Pass." *Id.* (Muniz, J., dissenting) (quoting agency's order).

On judicial review, the majority avoided the charter service question, but the dissent reached it and *agreed* that "use of recreational facilities at a destination constitutes a 'common trip purpose.'" *Id.* at 676, 677 (Muniz, J., dissenting). In fact, the dissent concluded that the transportation was for a common trip purpose "even though the recreation might not be identical for each passenger." *Id.* at 677. Thus, far from

supporting the WUTC's position, the dissent undercuts it.[10]

In a final attempt to justify imposing the PCN requirement on the Courtneys' fifth service, the WUTC cited *Kitsap County Transportation Company v. Manitou Beach-Agate Pass Ferry Ass'n*, 176 Wash. 486, 30 P.2d 233 (1934), for the proposition that "charter service cannot be used as a subterfuge for commercial ferry service." CP 437-38 (¶ 23). At the time of that decision, however, there was no exemption for "charter service." Now there is, and the Courtneys' fifth proposal falls squarely within it.

Moreover, the facts in that case were wildly different. There, as the WUTC acknowledges, "a group of Bainbridge Island residents created a 'ferry association' whose membership was open to anyone wishing to travel to Seattle and willing to pay the nominal fee." CP 437 (¶ 23). The association then "chartered a vessel from a ferry company that had previously been denied a [PCN certificate] to compete with the existing certificate holder" and "transport association members and their families, guests, and vehicles between the island and Seattle." CP 437-38 (¶ 23). The court determined the arrangement was a "pretense" and that its "real purpose was to establish and maintain a vehicular ferry service" that was,

[10] Although the dissent ultimately concluded the arrangement was not a "charter service," it did so because Oregon's statute "requires not only a common trip purpose but also a 'complete, cohesive group'"—an element the dissent found absent. 125 Or. App. at 677 (quoting Or. Rev. Stat. § 767.005(5)). The WUTC tried to impose a "complete cohesive group" requirement here, CP 436, 437 (¶¶ 20, 22), but Washington's "charter carrier" and "charter service" definitions contain no such a requirement.

"for all practical purposes, . . . open to all who might desire transportation between Seattle and Bainbridge Island." 176 Wash. at 488, 494, 495. Thus, the court concluded, it was a "common carrier." *Id.* at 492-96.

Here, on the other hand, the service would not be, "for all practical purposes, . . . open to all who might desire transportation" to Stehekin. *Id.* at 494. Rather, it "would be limited to customers who have purchased a travel package from [a] Stehekin-based travel company" for "lodging, meals, and/or other activities or services." CP 68. Those customers would be required, "[a]t the time of boarding, . . . to provide proof of identification, which boat staff would confirm against [a] manifest" provided by the travel company confirming that they were a customer of the travel company and had purchased a package from it. CP 69. That is hardly a "pretense" to serve "all who might desire transportation" to Stehekin. 176 Wash. at 494, 495. To the contrary, it is a charter arrangement that falls squarely within the "charter service" exemption.

VIII. CONCLUSION

The Courtneys respectfully request that this Court set aside the Declaratory Order and enter judgment declaring that a PCN certificate is not required to provide boat transportation service on Lake Chelan for customers of a specific business or group of businesses under the circumstances described in the Courtneys' petition for declaratory order.

Respectfully submitted this 5th day of June, 2017.

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APPENDIX

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RCW 81.84.010

Certificate of convenience and necessity required—Recreation exemption—Service initiation—Progress reports.

(1) A commercial ferry may not operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state, including the rivers and lakes and Puget Sound, without first applying for and obtaining from the commission a certificate declaring that public convenience and necessity require such operation. Service authorized by certificates issued to a commercial ferry operator must be exercised by the operator in a manner consistent with the conditions established in the certificate and tariff filed under chapter **81.28** RCW. However, a certificate is not required for a vessel primarily engaged in transporting freight other than vehicles, whose gross earnings from the transportation of passengers or vehicles, or both, are not more than ten percent of the total gross annual earnings of such vessel.

(2) If the commission finds, after a hearing, that an existing or a proposed commercial ferry service does not serve an essential transportation purpose and is solely for recreation, the commission may, by order, exempt that service from the requirements of certification and regulation under this chapter. If the nonessential service is a proposed service not already provided by an existing certificate holder, the commission must also find, after notice to any existing certificate holder operating within the same territory and an opportunity to be heard, that the proposed service would not adversely affect the rates or services of any existing certificate holder.

(3) This section does not affect the right of any county public transportation benefit area or other public agency within this state to construct, condemn, purchase, operate, or maintain, itself or by contract, agreement, or lease, with any person, firm, or corporation, ferries or boats across the waters within this state, including rivers and lakes and Puget Sound, if the operation is not over the same route or between the same districts being served by a certificate holder without first acquiring the rights granted to the certificate holder under the certificate.

(4) The holder of a certificate of public convenience and necessity granted under this chapter must initiate service within five years of obtaining the certificate, except that the holder of a certificate of public convenience and necessity for passenger-only ferry service in Puget Sound must initiate service within twenty months of obtaining the certificate. The certificate holder shall report to the commission every six months after the certificate is granted on the progress of the certificated route. The reports shall include, but not be limited to, the progress of environmental impact, parking, local government land use, docking, and financing considerations. Except in the case of passenger-only ferry service in Puget Sound, if service has not been initiated within five years of obtaining the certificate, the commission may extend the certificate on a twelve-month basis for up to three years if the six-month progress reports indicate there is significant advancement toward initiating service.

[**2009 c 557 § 2; 2007 c 234 § 92.** Prior: **2003 c 373 § 4; 2003 c 83 § 211; 1993 c 427 § 2; 1961 c 14 § 81.84.010;** prior: 1950 ex.s. c 6 § 1, part; 1927 c 248 § 1, part; RRS § 10361-1, part.]

NOTES:

Findings—Intent—2003 c 373: See note following RCW **47.64.090**.

Findings—Intent—Captions, part headings not law—Severability—Effective date—2003 c 83: See notes following RCW **36.57A.200**.

RCW 81.84.020

Application—Hearing—Issuance of certificate—Determining factors.

(1) Upon the filing of an application, the commission shall give reasonable notice to the department, affected cities, counties, and public transportation benefit areas and any common carrier which might be adversely affected, of the time and place for hearing on such application. The commission may, after notice and an opportunity for a hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by the certificate any terms and conditions as in its judgment the public convenience and necessity may require; but the commission may not grant a certificate to operate between districts or into any territory prohibited by RCW **47.60.120** or already served by an existing certificate holder, unless the existing certificate holder has failed or refused to furnish reasonable and adequate service, has failed to provide the service described in its certificate or tariffs after the time allowed to initiate service has elapsed, or has not objected to the issuance of the certificate as prayed for.

(2) Before issuing a certificate, the commission shall determine that the applicant has the financial resources to operate the proposed service for at least twelve months, based upon the submission by the applicant of a pro forma financial statement of operations. Issuance of a certificate must be determined upon, but not limited to, the following factors: Ridership and revenue forecasts; the cost of service for the proposed operation; an estimate of the cost of the assets to be used in providing the service; a statement of the total assets on hand of the applicant that will be expended on the proposed operation; and a statement of prior experience, if any, in such field by the applicant. The documentation required of the applicant under this section must comply with the provisions of RCW **9A.72.085**.

(3) In granting a certificate for passenger-only ferries and determining what conditions to place on the certificate, the commission shall consider and give substantial weight to the effect of its decisions on public agencies operating, or eligible to operate, passenger-only ferry service.

(4) Until July 1, 2007, the commission shall not accept or consider an application for passenger-only ferry service serving any county in the Puget Sound area with a population of over one million people. Applications for passenger-only ferry service serving any county in the Puget Sound area with a population of over one million pending before the commission as of May 9, 2005, must be held in abeyance and not be considered before July 1, 2007.

[**2007 c 234 § 93; 2006 c 332 § 11.** Prior: **2005 c 313 § 609; 2005 c 121 § 7; 2003 c 373 § 5; 2003 c 83 § 212; 1993 c 427 § 3; 1961 c 14 § 81.84.020;** prior: 1950 ex.s. c 6 § 1, part; 1927 c 248 § 1, part; RRS § 10361-1, part.]

NOTES:

Severability—2005 c 313: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**2005 c 313 § 901**.]

Effective date—2005 c 313: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 9, 2005]." [**2005 c 313 § 902**.]

Findings—Intent—2003 c 373: See note following RCW **47.64.090**.

Findings—Intent—Captions, part headings not law—Severability—Effective date—2003 c 83: See notes following RCW **36.57A.200**.

WAC 480-51-020

Definitions.

For the purposes of these rules, the following definitions shall apply:

(1) The term "commercial ferry" means every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers, appointed by any court whatever, owning, controlling, leasing, operating or managing any vessel over and upon the waters of this state.

(2) The term "certificated commercial ferry" means a person required by chapter **81.84** RCW to obtain a certificate of public convenience and necessity before operating any vessel upon the waters of this state.

(3) The term "common carrier ferry vessel" means a vessel primarily engaged in transporting freight other than vehicles, whose gross earnings from the transportation of passengers and/or vehicles are not more than ten percent of the total gross annual earnings of such vessel.

(4) The term "vessel" includes every species of watercraft, by whatever power operated, for public use in the conveyance of persons or property for hire over and upon the waters within this state, excepting all towboats, tugs, scows, barges, and lighters, and excepting rowboats and sailing boats under twenty gross tons burden, open steam launches of five tons gross and under, and vessels under five tons gross propelled by gas, fluid, naphtha, or electric motors.

(5) The term "transportation of property" includes any service in connection with the receiving, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage and handling of the property transported, and the transmission of credit.

(6) The term "transportation of persons" includes any service in connection with the receiving, carriage and delivery of the person transported and that passenger's baggage and all facilities used, or necessary to be used in connection with the safety, comfort and convenience of the person transported.

(7) The term "for hire" means transportation offered to the general public for compensation.

(8) The term "transfer" means sale, assignment, mortgage, lease or any other voluntary or involuntary conveyance of an interest in a certificate by the entity owning a certificate.

(9) The term "launch service" means transportation of passengers and/or freight to or from a vessel under way, at anchor or at a dock.

(10) The term "person" means any natural person or persons or any entity legally capable of taking any action.

(11) The term "published schedule" means a time schedule that is published by the certificate holder and filed with the commission in accordance with the provisions of WAC **480-51-090**.

(12) For the purposes of these rules, where the terms "United States Coast Guard" and/or "Coast Guard" are used, the term "Washington state department of labor and industries, marine division" shall be substituted if the commercial ferry boat operates on Washington state waterways not subject to Coast Guard regulation or if the vessel itself is subject to department of labor and industries, marine division, rules and regulations rather than those of the United States Coast Guard.

(13) The term "excursion service" means the carriage or conveyance of persons for compensation over the waters of this state from a point of origin and returning to the point of origin with an intermediate stop or stops at which passengers leave the vessel and reboard before the vessel returns to its point of origin.

(14) The term "charter service" means the hiring of a vessel, with captain and crew, by a person or group for carriage or conveyance of persons or property.

[Statutory Authority: RCW **81.84.070**, 1993 c 427, 1995 c 361 and RCW **80.01.040**(4). WSR 95-22-001 (Order R-435, Docket No. TS-941485), § 480-51-020, filed 10/18/95, effective 11/18/95.]

WAC 480-51-022

Exempt vessels and operations.

The rules of this chapter do not apply to the following vessels or operations:

(1) Charter services;

(2) Passenger-carrying vessels that depart and return to the point of origin without stopping at another location within the state where passengers leave the vessel;

(3) Vessels operated by not-for-profit or governmental entities that are replicas of historical vessels or that are recognized by the United States Department of the Interior as national historical landmarks;

(4) Excursion services that:

(a) Originate and primarily operate at least six months per year in San Juan County waters and use vessels less than sixty-five feet in length with a United States Coast Guard certificate that limits them to forty-nine passengers or less;

(b) Do not depart from the point of origin on a regular published schedule;

(c) Do not operate between the same point of origin and the same intermediate stop more than four times in any month or more than fifteen times during any twelve-month period;

(d) Use vessels that do not return to the point of origin on the day of departure; or

(e) Operate vessels upon the waters of the Pend Oreille River, Pend Oreille County, Washington.

[Statutory Authority: RCW **81.84.070**, 1993 c 427, 1995 c 361 and RCW **80.01.040**(4). WSR 95-22-001 (Order R-435, Docket No. TS-941485), § 480-51-022, filed 10/18/95, effective 11/18/95.]

WAC 480-51-025

General operation.

(1) Commercial ferries must comply with all pertinent federal and state laws, chapter **81.84** RCW, and the rules of this commission.

(2) No certificated commercial ferry shall provide service subject to the regulation of this commission without first having obtained from the commission a certificate declaring that public convenience and necessity require, or will require, that service.

(3) No company may operate any vessel providing excursion service subject to the regulation of this commission over the waters of this state without first having obtained a certificate of public convenience and necessity as provided in RCW **81.84.010**.

(4) Any operator holding unrestricted commercial ferry authority may provide excursion service on an existing route without the need to obtain additional authority. The commission may restrict grants of commercial ferry authority to operations in excursion service.

(5) Any certificate of public convenience and necessity obtained by any false affidavit, statement or misrepresentation shall be subject to revocation and cancellation by this commission.

[Statutory Authority: RCW **81.84.070**, 1993 c 427, 1995 c 361 and RCW **80.01.040**(4). WSR 95-22-001 (Order R-435, Docket No. TS-941485), § 480-51-025, filed 10/18/95, effective 11/18/95.]

RCW 81.68.015

Application of chapter restricted.

This chapter does not apply to corporations or persons, their lessees, trustees, receivers, or trustees appointed by any court whatsoever insofar as they own, control, operate, or manage taxicabs, hotel buses, school buses, or any other carrier that does not come within the term "auto transportation company" as defined in RCW **81.68.010**.

This chapter does not apply to persons operating motor vehicles when operated wholly within the limits of incorporated cities or towns, and for a distance not exceeding three road miles beyond the corporate limits of the city or town in Washington in which the original starting point of the vehicle is located, and which operation either alone or in conjunction with another vehicle or vehicles is not a part of any journey beyond the three-mile limit.

This chapter does not apply to commuter ride sharing or ride sharing for persons with special transportation needs in accordance with RCW **46.74.010**, so long as the ride-sharing operation does not compete with or infringe upon comparable service actually being provided before the initiation of the ride-sharing operation by an existing auto transportation company certificated under this chapter.

This chapter does not apply to a service carrying passengers for compensation over any public highway in this state between fixed termini or over a regular route if the commission finds, with or without a hearing, that the service does not serve an essential transportation purpose, is solely for recreation, and would not adversely affect the operations of the holder of a certificate under this chapter, and that exemption from this chapter is otherwise in the public interest. Companies providing these services must, however, obtain a permit under chapter **81.70** RCW.

This chapter does not apply to a service carrying passengers for compensation over any public highway in this state between fixed termini or over a regular route if the commission finds, with or without a hearing, that the service is provided pursuant to a contract with a state agency, or funded by a grant issued by the department of transportation, and that exemption from this chapter is otherwise in the public interest. Companies providing these services must, however, obtain a permit under chapter **81.70** RCW.

[**2009 c 557 § 1; 2007 c 234 § 47; 1989 c 163 § 2; 1984 c 166 § 2.**]

WAC 480-30-011

Exempt operations.

The commission does not regulate the following passenger transportation operations under this chapter:

(1) Auto transportation company operations conducted wholly within the limits of an incorporated city or town, or auto transportation company operations from a point in a city or town in the state of Washington for a distance of not more than three road miles beyond the corporate limits of the city or town in which the trip began. The operations must not be part of a journey beyond the three-mile limit, either alone or in conjunction with another vehicle or vehicles.

(2) Commuter ride sharing or ride sharing for persons with special transportation needs under RCW **46.74.010**, provided the ride-sharing operation does not compete with nor infringe upon comparable service that was actually provided by an auto transportation company under chapter **81.68** RCW before the ride-sharing operation started.

(3) Municipal corporations and other government entities.

(4) Public transit agencies.

(5) Persons operating vehicles under exclusive contract to a public transit agency.

(6) Persons owning, operating, controlling, or managing taxi cabs, hotel buses, or school buses, when operated as such.

(7) Passenger vehicles carrying passengers on a noncommercial basis, including but not limited to, nonprofit corporations.

(8) Private carriers who, in their own vehicles, transport passengers as an incidental adjunct to some other established private business owned or operated by them in good faith.

(9) Transporting transient air flight crew or in-transit airline passengers between an airport and temporary hotel accommodations under an arrangement between the airline carrier and the passenger transportation company.

(10) Substituting ground transportation for air transportation under an arrangement between the airline carrier and the passenger transportation company in emergency situations arising from the inability of the air carrier to perform air transportation due to adverse weather conditions, equipment failure, or other causes.

(11) Transporting passengers who have had or will have had a prior or subsequent movement by air under a through ticket or common arrangement with an airline or with a connecting out-of-state passenger transportation company.

(12) Any other carrier or company that does not come within the term:

(a) "Auto transportation company" as defined in RCW **81.68.010**;

(b) "Charter party carrier" as defined in RCW **81.70.020**; or

(c) "Excursion service carrier" as defined in RCW **81.70.020**.

[Statutory Authority: RCW **80.01.040**, **80.04.160**, **80.54.020**, and **80.54.060**. WSR 16-02-076 (Docket TE-151080, General Order R-583), § 480-30-011, filed 1/4/16, effective 2/4/16. Statutory Authority: RCW **80.01.040**, **81.04.160**, **81.12.050**, **81.68.030**, and **81.70.270**. WSR 06-13-006 (General Order No. R-533, Docket No. TC-020497), § 480-30-011, filed 6/8/06, effective 7/9/06.]

WAC 480-30-036

Definitions, general.

(1) See WAC 480-30-261 for definition of terms used primarily in tariffs and time schedules and WAC 480-30-216 for definitions used in driver and vehicle safety rules.

(2) Unless the language or context indicates that a different meaning is intended, the following definitions apply:

"Agent" means a person authorized to transact business for, and in the name of, another.

"Airporter service" means an auto transportation service that starts or ends at a station served by another type of transportation such as, air or rail transportation. Airporter service is often a premium service that involves handling luggage. Although stops may be made along the way, they are usually limited to picking up or discharging passengers, luggage, and/or express freight bound to or from the airport or depot served.

"Alternate arrangements for passengers" means the travel arrangements made by an auto transportation company that has accepted a trip booking or reservation from a passenger and that is unable to provide the agreed transportation. The alternate arrangements may require travel by another carrier or mode of transportation at no additional cost to the passenger beyond what the passenger would have paid for the original transportation arrangement.

"Application docket" means a commission publication providing notice of all applications requesting auto transportation operating authority, with a description of the authority requested. The commission sends this publication to all persons currently holding auto transportation authority, to all persons with pending applications for auto transportation authority, to affected local jurisdictions or agencies, and to all other persons who asked to receive copies of the application docket.

"Area" means a defined geographical location. Examples include, but are not limited to:

(a) A specified city or town;

(b) A specified county, group of counties, or subdivision of the state, e.g., western Washington;

(c) A zone, e.g., company designated territory; or

(d) A route, e.g., area within four road miles of Interstate 5.

"Auto transportation company" means every person owning, controlling, operating, or managing any motor-propelled vehicle not usually operated on or over rails, used in the business of transporting persons over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the incorporated limits of any city or town.

"Between fixed termini or over a regular route" means the fixed points between which an auto transportation company provides service or the route over which an auto transportation company ordinarily operates any motor-propelled vehicle, even though there may be variance whether the variance is periodic or irregular.

"Bus" means a motor vehicle designed, constructed, and/or used for the transportation of passengers.

"Business days" means days of the week excluding Saturdays, Sundays, and official state holidays.

"By-reservation-only service" means transportation of passengers by an auto transportation company, with routes operated only if passengers have made prior reservations.

"Certificate" means:

(a) The certificate of public convenience and necessity issued by the Washington utilities and transportation commission under the provisions of chapter 81.68 RCW to operate as an auto transportation company; or

(b) The certificate issued by the Washington utilities and transportation commission under chapter 81.70 RCW to operate as a charter and excursion carrier in the state of Washington.

"Certificated authority" means:

(a) The territory and services granted by the commission and described in an auto transportation company's certificate of public convenience and necessity; or

(b) Operations in the state of Washington for charter and excursion service carriers.

"Charter party carrier" or **"charter carrier"** means every person engaged in the transportation of a group of persons who, pursuant to a common purpose and under a single contract, have acquired the use of a motor bus to travel together as a group to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartering group after having left the place of origin, or who is engaged in the transportation of persons by party bus over any public highway in this state.

"Claim" means a demand made on a company for payment resulting from a loss sustained through the company's negligence or for inadequate service provided by the company.

"Closed-door service" means a portion of a route or territory in which an auto transportation company is not allowed to pick up or deliver passengers. Closed-door service restrictions must be clearly stated in an auto transportation company's certificate.

"Common purpose" means that a group of persons is traveling together to achieve a common goal or objective. For example, a group of persons traveling together to attend a common function or to visit a common location. For the purposes of these rules it does not mean a group of persons who have no common goal other than transportation to, or from, the airport.

"Commission" means the Washington utilities and transportation commission.

"Common carrier" means any person who transports passengers by motor vehicle over the public highways for compensation.

"Company" means an entity authorized by the commission to transport passengers, for compensation, using a motor vehicle, over the public highways of the state.

"Complaint" means one of two types of actions by a person against a passenger transportation company that the commission regulates:

(a) **"Informal complaints"** are those complaints filed with the commission under the provisions of WAC **480-07-910**. Informal complaints are normally investigated and resolved by commission staff.

(b) **"Formal complaints"** are those complaints filed with the commission under the provisions of WAC **480-07-370**. In a formal complaint, the burden of proof resides with the complaining party who must prove its assertions in a formal commission proceeding.

"Connecting service" means an auto transportation company service over a route, or routes, that require passengers to transfer from one vehicle to another vehicle operated by either the same company or a different company before reaching the ending point.

"Contract carrier" means a person holding a certificate issued by the commission authorizing transportation of passengers under special and individual contracts or agreements.

"Customer" means a person who purchased transportation services from an auto transportation company or a person, corporation, or other entity that prearranges for transportation services with a charter party carrier or purchases a ticket for transportation services aboard an excursion service carrier.

"Direct route" means an auto transportation company service over a route that goes from the beginning point to the ending point with limited, if any, stops along the way, and traveling only to points located on the specific route without requiring a passenger to transfer from one vehicle to another.

"Discontinuance of service":

(a) **"Permanent discontinuance of service"** means that a company holding auto transportation authority issued by the commission is unable to continue to provide all, or part of, the service authorized by the company's certificate, filed tariff, or filed time schedule and requests commission permission to permanently discontinue all, or part of, its service and relinquish that certificate or portion of that certificate. See WAC **480-30-186**.

(b) **"Temporary discontinuance of service"** means that a company holding auto transportation authority issued by the commission is unable to continue to provide all, or part of, the service authorized by the company's certificate, filed tariff, or filed time schedule and requests commission permission to discontinue all, or part of, its service for a specified, limited period of time.

"Door-to-door service" means an auto transportation company service provided between a location identified by the passenger and a point specifically named by the company in its filed tariff and time schedule.

"Double-decker bus" means a motor vehicle with more than one passenger deck.

"Excursion service carrier" or **"excursion carrier"** means every person engaged in the transportation of persons for compensation over any public highway in the state from points of origin within any city, town, or area, to any other location within the state of Washington and returning to that origin. The service will not pick up or drop off passengers after leaving and before returning to the area of origin. The excursions may or may not be regularly scheduled. Compensation for the transportation offered must be computed, charged, or assessed by the excursion service company on an individual fare basis.

"Express freight/package service" means transportation of freight and packages, other than packages or baggage carried or checked by passengers, offered by a passenger transportation company.

"Express passenger service" means auto transportation company service provided between fixed points or stations with few, if any, stops along the route, and is designed to get passengers from origin to destination more quickly than normally scheduled passenger service.

"Federal Motor Carrier Safety Administration" means an agency of the United States Department of Transportation (USDOT) and successor agency to the former Interstate Commerce Commission.

"Filing" means any application, petition, tariff proposal, annual report, comment, complaint, pleading, or other document submitted to the commission.

"Fixed termini" means points of origin and destination that are set, static locations or defined geographic areas. Examples include a city or town, a building or an airport. In addition "fixed termini" can include service between an airport and unlimited points within a defined geographic area.

"Flag stops" means a point along an auto transportation company's normally traveled routes where the company stops only if it receives notification that a passenger wishes to board the vehicle at that point. An auto transportation company must list available flag stops in the company's tariffs and time schedules. Flag stops may only be named at points that provide waiting passengers safe access to the vehicle.

"Group" means:

(a) Two or more passengers traveling together;

(b) A class of passengers to whom special rates and/or rules apply. For example, active military personnel.

"Intermediate point" means a point located on a route between two other points that are specifically named in an auto transportation company's certificate or tariff.

"Intermediate service" means service to an intermediate point.

"Interruption in service" means a period of time during which an auto transportation company cannot provide service listed in its certificate, its filed tariff, or its filed time schedule. An interruption in service is normally short lived, lasting no more than a few hours or a few days.

"Leasing":

(a) **"Leasing authority"** means one auto transportation company allowing another person to operate all, or a portion, of the authority granted to the first company by the commission. A joint application to, and approval from, the commission is required to lease authority. See WAC **480-30-141**.

(b) **"Leasing equipment"** means the act of a passenger transportation company to supplement its fleet by acquiring a vehicle(s) from a third party for a specified period of time under contract. See WAC **480-30-236**.

"Liquor permit holder" means a holder of an appropriate special permit to provide liquor issued under chapter **66.20** RCW, who is twenty-one years of age or older and who is responsible for compliance with the requirements of WAC **480-30-244** and chapter **66.20** RCW during the provision of transportation services.

"Motor vehicle" or **"vehicle"** means:

(a) As related to auto transportation companies: Every self-propelled vehicle used on the public highways, for the transportation of persons for compensation.

(b) As related to charter and excursion carriers: Every self-propelled vehicle with a manufacturer's seating capacity for eight or more passengers, including the driver, used on the public highways, for the transportation of persons for compensation.

"Named points" means cities, towns, or specific locations that are listed in an auto transportation company's certificate, tariff, or time schedule.

"Nonstop service" means transportation of passengers from point of origin to point of destination without stopping at any intermediate points.

"On-call service" means unscheduled auto transportation company service provided only to those passengers that have by prior arrangement requested service prior to boarding.

"Party bus" means any motor vehicle whose interior enables passengers to stand and circulate throughout the vehicle because seating is placed around the perimeter of the bus or is nonexistent and in which food, beverages, or entertainment may be provided. A motor vehicle configured in the traditional manner of forward-facing seating with a center aisle is not a party bus.

"Passenger facility" means a location at which an auto transportation company stations employees and at which passengers can purchase tickets or pay fares for transportation service.

"Passenger transportation company" means an auto transportation company or charter and excursion carrier.

"Person" means an individual, firm, corporation, association, partnership, lessee, receiver, trustee, consortium, joint venture, or commercial entity.

"Premium service" means a type of service provided by an auto transportation company that is outside normal service. Examples include express service, direct route service, and nonstop door-to-door service.

"Private carrier" means a person who transports passengers in the person's own vehicle purely as an incidental adjunct to some other established private business owned or operated by that person in good faith.

"Private motor vehicle" means a vehicle owned or operated by a private carrier.

"Public highway" means every street, road, or highway in this state.

"Public transit agency" means a municipal corporation or agency of state or local government formed under the laws of the state of Washington for the purpose of providing transportation services including, but not limited to, public transportation benefit areas, regional transit authorities, municipal transit authorities, city and county transit agencies.

"Residence" means the regular dwelling place of an individual or individuals.

"Route" means a highway or combination of highways over which an auto transportation company provides passenger service. There are two types of routes:

(a) **"Irregular route"** means travel between points named in an auto transportation company's certificate via any highway or combination of highways the company wishes to operate over. The certificate issued to the company does not list highways to be used, but the company defines routes in its tariffs and time schedules.

(b) **"Regular route"** means an auto transportation company providing passenger transportation over a route named in the certificate issued to the company by the commission.

"Scheduled service" means an auto transportation company providing passenger service at specified arrival and/or departure times at points on a route.

"Single contract" means an agreement between a charter carrier and a group of passengers to provide transportation services at a set price for the group or trip. Under a single contract, passengers are not charged individually.

"Small business" means any company that has fifty or fewer employees.

"Special or promotional fares" means temporary fares for specific services offered for no more than ninety days.

"State" means the state of Washington.

"Subcontracting - Auto transportation company" means that an auto transportation company holding authority from the commission contracts with a second auto transportation company to provide service that the original company has agreed to provide, but finds it is unable to provide. See WAC **480-30-166**.

"Subcontracting - Charter and excursion carrier" means that a charter and excursion carrier holding authority from the commission contracts with a second charter and excursion carrier to provide service that the original carrier has agreed to provide, but finds it is unable to provide.

"Substitute vehicle" means a vehicle used to replace a disabled vehicle for less than thirty days.

"Suspension" means an act by the commission to temporarily revoke a company's certificated authority; or an act by the commission to withhold approval of an auto transportation company's tariff filing.

"Tariff" or **"tariff schedule"** means a document issued by an auto transportation company containing the services provided, the rates the company must assess its customers for those services, and the rules describing how the rates apply.

"Tariff service territory" means a company-defined geographic area of its certificated authority in which a specific tariff applies.

"Temporary certificate" means the certificate issued by the Washington utilities and transportation commission under RCW **81.68.046** to operate as an auto transportation company for up to one hundred eighty days or pending a decision on a parallel filed auto transportation company certificate application.

"Temporary certificate authority" means the territory and services granted by the commission and described in an auto transportation company's temporary certificate.

"Ticket agent agreements" means a signed agreement between an auto transportation company and a second party in which the second party agrees, for compensation, to sell tickets to passengers on behalf of the auto transportation company. See WAC **480-30-391**.

"Time schedule" means a document filed as part of an auto transportation company's tariff, or as a separate document, that lists the routes operated by the company including the times and locations at which passengers may receive service and any rules specific to operating those routes.

[Statutory Authority: RCW **80.01.040**, **80.04.160**, **80.54.020**, and **80.54.060**. WSR 16-02-076 (Docket TE-151080, General Order R-583), § 480-30-036, filed 1/4/16, effective 2/4/16. Statutory Authority: RCW **80.01.040**, **81.04.160**, **81.12.050**, **81.68.030**, and **81.70.270**. WSR 06-13-006 (General Order No. R-533, Docket No. TC-020497), § 480-30-036, filed 6/8/06, effective 7/9/06.]

WAC 480-30-086

Certificates, general.

(1) **Certificate required.** A person must have a certificate from the commission before operating as a passenger transportation company in the state of Washington.

(2) **Company name.** The company name is the name of the certificate holder.

(a) A company electing to conduct operations under a trade name must first register the trade name with the commission.

(b) A company must conduct all operations under the company name, a registered trade name, or both. Operations includes, but is not limited to, advertising, ticketing, and identifying vehicles.

(c) A company may not operate under a company name or trade name that is similar to that of another company if use of the similar name misleads the public or results in unfair or destructive competitive practices.

(3) **Display.** A company must keep its original certificate on file at its principal place of business open to inspection by any customer, law enforcement officer, or authorized commission representative who asks to see it.

(4) **Replacement.** The commission will replace a lost or destroyed original certificate at no charge.

(5) **Description of certificated authority.** When a company's certificate authority includes boundaries such as cities, towns, streets, avenues, roads, highways, townships, ranges or other descriptions, the boundaries remain established as they existed at the time the commission granted the authority.

(6) **Operating within certificated authority.**

(a) A company must operate strictly within the authority described in its certificate.

(b) The commission may take administrative action against a company operating outside its certificated authority. Refer to WAC **480-30-241** for information regarding the commission's compliance policy.

[Statutory Authority: RCW **80.01.040**, **80.04.160**, **80.54.020**, and **80.54.060**. WSR 16-02-076 (Docket TE-151080, General Order R-583), § 480-30-086, filed 1/4/16, effective 2/4/16. Statutory Authority: RCW **80.01.040**, **81.04.160**, **81.12.050**, **81.68.030**, and **81.70.270**. WSR 06-13-006 (General Order No. R-533, Docket No. TC-020497), § 480-30-086, filed 6/8/06, effective 7/9/06.]

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United States District Court,
N.D. Georgia,
Atlanta Division.

Lisa Ann BYARS, et al., Plaintiffs,
v.
The COCA-COLA COMPANY, et al., Defendants.

Civil Action No. 1:01-CV-3124-TWT.
|
Aug. 28, 2006.

Attorneys and Law Firms

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ORDER

THOMAS W. THRASH, JR., District Judge.

***1** This is an ERISA action. It is before the Court on the Coca-Cola Defendants' Motion for Standard of Review [186] and Motion for Summary Judgment [193], Defendants Reliastar Life Insurance Company, Kemper National Services Inc., and NATLSCO, Inc.'s ("Reliastar's") Motion for Summary Judgment and on Standard of Review [198], and the Plaintiff's Motion for Summary Judgment [192] and Motion for Partial Summary Judgment on its ERISA § 502(c) Claims [195]. For the reasons set forth below, Coca-Cola's Motion on Standard of Review is GRANTED and its Motion for Summary Judgment is GRANTED in part and DENIED in part, Reliastar's Motion for Summary Judgment is GRANTED, and the Plaintiff's Motion for Summary Judgment is GRANTED in part and DENIED in part and her Motion for Partial Summary Judgment is DENIED.

I. *BACKGROUND*

The Plaintiff, Lisa Byars, was an employee of Defendant Coca-Cola and a participant in Coca-Cola's Long Term Disability Income Plan ("the Plan"). The Plan expressly named Coca-Cola as the Plan Administrator. Coca-Cola delegated certain of its powers and duties as Plan Administrator to the Long Term Disability Committee ("the Committee"). The Plan also provided for initial claims determinations by Reliastar, the Plan's administrative services provider. In August 1999, Reliastar outsourced its responsibilities under the Plan to NATLSCO, Inc. ("NATLSCO"). Between August 1999 and December 2002, NATLSCO performed administrative services for the Plan through its subsidiary Kemper National Services Inc. ("Kemper").

In 1977, the Plaintiff began working for Defendant Coca-Cola. As of August 1999, she was working as a product consultant. At that time, however, she requested a leave of absence because of injuries she sustained after falling from a horse while on vacation. As a result of this injury, the Plaintiff claimed to be suffering from pain in her right buttock and leg, a condition which she describes as "sciatica." She received short term disability benefits through February 2000, the maximum six month period, and then applied for long term disability under the Plan. On April 14, 2000, Reliastar denied her initial claim for benefits. The Plaintiff appealed that decision and provided some additional medical documentation. One of Reliastar's reviewers, Dr. Wallquist, then performed a comprehensive review of her medical records and concluded that there were no "quantitative objective physical findings or diagnostics" to support her claim for long term disability benefits. (Admin. Rec., at CC 78-81.) Her claim was thus again denied.

On September 22, 2000, the Plaintiff submitted her second and final appeal to the Committee. The Committee's representative on this claim, Barbara Gilbreath, received the claim file from Reliastar on January 19, 2001. On January 23, 2001, the Committee, acting through Gilbreath, denied the Plaintiff's final appeal based on a lack of documentation and objective clinical data to

support the Plaintiff's claim that she was continuously unable to work.

***2** The Plaintiff then consolidated her claim with that of other Coca-Cola employees in a class action complaint filed October 22, 2002. Following an April 4, 2005 Order by this Court deconsolidating the case, the Plaintiff brought this action against Coca-Cola, the Plan, the Committee, Gilbreath, and Reliastar. She seeks damages based on wrongful denial of benefits under ERISA § 502(a)(1)(B), failure to provide all Plan documents under § 502(c), and attorney's fees under § 502(g). *See* 29 U.S.C. § 1132. Defendant Reliastar has also filed a counterclaim for attorney's fees.

II. *SUMMARY JUDGMENT STANDARD*

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257 (1986).

III. *DISCUSSION*

A. *Standard of Review*

At the outset in an ERISA action such as this one, the Court must determine the standard by which to review the administrator's decision to deny the Plaintiff's disability benefits claim. ERISA itself does not provide a standard of review for decisions of a plan administrator or fiduciary. In the absence of statutory guidance, the Supreme Court has established a range of standards for judicial review of benefits determinations under ERISA. In *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989), the Supreme Court held:

> [A] denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

(citations and quotation marks omitted). Consistent with *Firestone,* the Eleventh Circuit has adopted three standards for judicial review of an administrator's benefits determination: (1) *de novo* review where the plan administrator is not afforded discretion; (2) arbitrary and capricious standard when the plan grants discretion to the plan administrator; and (3) heightened arbitrary and capricious standard where there is a conflict of interest. *Williams v. BellSouth Telecomms., Inc.,* 373 F.3d 1132, 1134 (11th Cir.2004); *Paramore v. Delta Air Lines, Inc.,* 129 F.3d 1446, 1449-50 (11th Cir.1997). Here, according to the terms of the Plan, the Committee acted as Plan Administrator for Coca-Cola and had the discretion to make all final benefits determinations. (Am. Compl., Ex. 1-A; 1-B.) Moreover, the Plan benefits were paid from a trust funded by Coca-Cola through irrevocable, periodic contributions. (Am. Compl., Ex 1-K.) The Eleventh Circuit has repeatedly held that this type of funding structure "eradicates any alleged conflict of interest so that the arbitrary or capricious standard of review applies." *Turner v. Delta Family-Care Disability and Survivorship* Plan, 291 F.3d 1270, 1273 (11th Cir.2002); *Buckley v. Metropolitan Life,* 115 F.3d 936, 939-40 (11th Cir.1997).

***3** The Plaintiff argues that although the Plan assigned discretion to the Committee, Reliastar actually made the final decision and the Committee merely placed a rubber stamp of approval on those determinations. The Plaintiff thus alleges that Defendant Reliastar acted as the de facto Plan Administrator and that, because Reliastar was not granted discretion under the Plan, the decision to deny her benefits should be subjected to *de novo* review. *See Hamilton v. Allen-Bradley Co., Inc.,* 244 F.3d 819, 824 (11th Cir.2001) (holding that a determination as to whether a party acted as a de facto administrator depends on whether it "had sufficient decisional control over the claim process"). The Eleventh Circuit has made clear, however, that "[t]he proper party defendant in an action concerning ERISA benefits is the party that controls administration of the plan." *Garren v. John Hancock Mut.*

Life Ins. Co., 114 F.3d 186, 187 (11th Cir.1997). It is inappropriate to assign liability to a party incapable of providing the relief requested. *Hunt v. Hawthorne Assocs., Inc.,* 119 F.3d 888, 907 (11th Cir.1997). Here, the Plan clearly defines Coca-Cola, the employer, as the Plan Administrator and Reliastar as the administrative services provider. The Court finds no cause to reach out beyond this clear assignment and impute liability to a third party insurance company whose contractual obligations were limited to the processing of claims. Moreover, Reliastar did not have the express authority to pay the Plaintiff's benefits claim without final approval from the Committee, and thus could not provide the Plaintiff's requested remedy. For these reasons, the Court finds that "arbitrary and capricious" review of the Committee's decision to deny benefits is appropriate.

B. *Denial of Benefits Under ERISA § 502(a)(1)(B)*

The Eleventh Circuit has adopted a multi-step approach for reviewing virtually all ERISA plan benefit denials. *See Williams,* 373 F.3d at 1138; *HCA Health Servs. of Ga., Inc. v. Employers Health Ins. Co.,* 240 F.3d 982 (11th Cir.2001). In this instance, the Court must first apply a *de novo* standard of review "to determine whether the claim administrator's benefits-denial decision is 'wrong' (i.e., the court disagrees with the administrator's decision); if it is not, then end the inquiry and affirm the decision." *Williams,* 373 F.3d at 1138. If the Court determines, however, that the administrator's decision was wrong, it must then examine the reasonableness of that determination under the arbitrary and capricious standard of review. *Id.* Where the Court finds that the decision is supported by reasonable grounds, the decision is affirmed. If not, it is reversed.

1. *De Novo Review*

The Court must first determine whether the administrator's decision was *de novo* wrong. " 'Wrong' is the label used by our precedent to describe the conclusion a court reaches when, after reviewing the plan documents and disputed terms *de novo,* the court disagrees with the claims administrator's plan interpretation." *HCA Health Servs.,* 240 F.3d at 994 n. 23. Under ERISA, a disability claimant bears the burden of showing that she was disabled. *Brucks v. Coca-Cola Co.,* 391 F.Supp.2d 1193, 1205 (N.D.Ga.2005) (*citing Horton v. Reliance Standard Life Ins. Co.,* 141 F.3d 1038, 1040 (11th Cir.1998)). The Plaintiff must thus demonstrate that during the first 24 months of her disability she was "continuously disable[d] from performing [her] normal duties for [her] employer." (LTD Plan, ¶ 1. 11.) After this initial 24 months, the Plaintiff "will be considered to have a Disability if physical or mental illness or injury continuously disables [her] from engaging in any occupation for wage or profit, for which [she] is reasonably qualified by training, education or experience." (*Id.*)

***4** According to the Job Analysis Worksheet completed by her supervisor, the Plaintiff's job as "Product Consultant I" involved managing "support processes and monitoring tools to enable Processing Services 24 x 7 availability of data center." (Admin. Rec., at CC 82.) The job required sitting six hours a day and walking one hour a day. It also required working with others five hours a day and working under deadlines seven hours a day. The Plaintiff relies on the following evidence to show that she was disabled under the Plan's definition.

First, in an "Estimated Functional Capacities Evaluation" completed on February 10, 2000, her physician, Dr. Payne, stated that over an eight hour workday, she could sit for only two hours, stand for two hours, and walk for one hour. (*Id.,* at CC 111.) He further stated that, at that time, she could not work. (*Id.,* at CC 112.) Dr. Payne also performed an MRI in February 2000. He saw signs of irritation in her sciatic nerve and again opined that she could not return to work. (*Id.,* at CC 100.) The Plaintiff also presented evidence from a consulting physician, Dr. Gibbons, who reported only that she had "sciatic nerve root tenderness" and could be suffering from fibrosis. (*Id.,* at CC 73.) He also noted that she had a "subcutaneous nodule which feels like some fatty thickening in the right buttocks area." (*Id.*)

When Dr. Payne again examined her on June 28, 2000, ten months after her injury, her condition still had not significantly improved. An MRI showed "a 1 x 2 x 3 cm. nodule in the gluteal area, in the area of the sciatic nerve." (*Id.,* at CC 63.) He further reported that she was on various pain medications and anti-inflammatories and had also been injected with Hydrocortisone. According to his report, as a result of this continued pain, she had difficulty sitting for any length of time and could not squat or bend without significant pain.

The Plaintiff next points to a mental health evaluation performed by Dr. Haberman on June 20, 2000, in which he opined that she met the Plan's definition of disability. According to Dr. Haberman, the Plaintiff had a long history of chronic depression and unhappiness that had worsened since her injury in the fall of 1999. He found that she "objectively presented a high level of anxiety in both mood and affect and was noted to be self-negative and self-critical, indecisive." (*Id.,* at CC 66.) He diagnosed her as having an Obsessive Compulsive Disorder, Social Anxiety Disorder, and Dysthemia with atypical features. (*Id.,* at CC 67.) She scored a 105 on the Leibowitz Social Anxiety scale, which he found to be consistent with his diagnosis of Social Anxiety Disorder. (*Id.*) He also gave her a Global Assessment of Functioning score of 60 and opined that she had moderate impairment with "Problem Solving," "Decision Making," and "Ability to Modulate Affect." (*Id.,* at CC 120.) Finally, the Plaintiff presents a letter from the Social Security Administration confirming that she has been approved for disability benefits. (*Id.,* at CC 88-90). [2]

***5** Against the Plaintiff's evidence of disability, the Defendants rely primarily on the conclusions of Dr. Wallquist, [3] a consulting orthopedic surgeon who opined that the Plaintiff was not disabled under the Plan's definition for several reasons. First, he found that Drs. Payne and Gibbons's initial examinations did not reveal a disability. Specifically, Dr. Payne's EMG/NCV exam in December, 1999, and MRI scans from February and June, 2000, indicated a gluteus muscle of normal signal intensity and that her lumbar spine was interpreted as normal. (*Id.,* at CC 79.) Dr. Wallquist interpreted Dr. Gibbons's findings as having no diagnostics or strong objective findings to support the claimant's subjective complaints. (*Id.,* at CC 80.) He also pointed out that these two doctors failed to submit any additional medical documentation on appeal that provided any new quantitative evidence for reinstatement of disability benefits.

Dr. Wallquist further noted that Dr. Allison Drake, another physician consulted by the Plaintiff, had expressed doubts about the legitimacy of the Plaintiff's injuries. She reported a "questionable sciatic nerve contusion. This does not follow any particular pathology." (*Id.,* at CC 105.) She also opined that "this patient should be able to do sedentary-type of activity as long as she is able to change her position on a frequent basis." (*Id.,* at CC 106.) On December 10, 1999, following an Electromyography(EMG)/Nerve Conduction Velocity(NCV) study, [4] Dr. Drake Reported that "[t]here is no electrodiagnostic evidence of a lumbar radiculopathy, sciatic nerve injury, peroneal mononeuropathy, peripheral neuropathy, or plexopathy" and concluded "[i]n light of the above findings, I'm still unclear as to the etiology of this patient's discomfort, but it does appear to primarily muscular." (*Id.,* at CC 104.)

After reviewing all of the evidence, the Court finds that the Committee's decision to deny benefits to the Plaintiff during the first 24 months was wrong. The June 2000 reports from Drs. Payne and Haberman show that the combination of the Plaintiff's chronic physical pain from her injury and the aggravation of her mental disorder made it impossible for her to perform the normal duties of her job. The job analysis completed by the Plaintiff's supervisor demonstrates that she was required to sit for six hours a day and work under deadlines for seven hours a day. Dr. Payne, the only physician who actually examined the Plaintiff and completed a functionality assessment on her, stated that she could sit for no more than two hours during an eight hour workday. In his June 28, 2000 report, he reiterated that "[i]t is now 10 months since her injury and she is still plagued with pain which requires significant limitations of her activities of daily living." (Admin. Rec., at CC 63-64.) The Defendants' consulting physicians have not sufficiently disputed this conclusion. Although Dr. Wallquist opined she was capable of performing her occupation, he further stated that reasonable restrictions to be placed on her "would include alternating sitting and standing positions at work." (*Id.,* at CC 81.) Dr. Drake made a similar assessment. (*Id.,* at CC 106.) Based on the Plaintiff's job requirements, frequent position changes would not allow her to perform the essential functions of her job. *See Seitz v. Metropolitan Life Ins. Co.,* 433 F.3d 647, 651 (8th Cir.2006) ("[W]hen a Plan uses an individual's own occupation to determine whether he or she is totally disabled, being able to perform some job duties is insufficient to deny benefits."). The Court thus concludes that the Plaintiff could not perform all the normal duties of her job and was entitled to benefits for the first 24 months of her period of disability.

***6** As to her LTD Benefits claim beyond the initial 24 months, however, the Court finds that she has failed to present evidence sufficient to support such a claim. Her medical records do not demonstrate that she is physically disabled from engaging in any occupation for which

she is qualified. Indeed, in his final correspondence, Dr. Payne admitted that the Plaintiff was incapable only of performing any jobs that required prolonged sitting or standing. Thus, based on Dr. Payne's functional capacities evaluation, this Court finds that the Plaintiff would need to change her position approximately every hour. She has not demonstrated that there are no jobs for which she is qualified that would allow her to do so.

2. *Arbitrary and Capricious Review*

Because the Plan provided the Committee with discretion, the Court must next assess whether the decision to deny benefits was arbitrary and capricious. "In determining whether the denial of the [plan participant's] claims was arbitrary and capricious, 'the function of the court is to determine whether there was a reasonable basis for the decision, based upon the facts as known to the administrator at the time the decision was made.' " *Dyce v. Salaried Employees' Pension Plan of Allied Corp.,* 15 F.3d 163, 166 (11th Cir.1994) (*citing Jett v. Blue Cross & Blue Shield of Ala., Inc.,* 890 F.2d 1137, 1139 (11th Cir.1989)). The Court is thus limited to determining whether the Committee's interpretation of the Plan was "made rationally and in good faith." *Cagle v. Bruner,* 112 F.3d 1510, 1518 (11th Cir.1997). In this case, the record demonstrates that the Committee representative assigned to the Plaintiff's claim failed to apply the correct definition of disability in reviewing Reliastar's decision. In her January 23, 2001 denial letter, Gilbreath stated that a Plan Participant would be considered to have a disability only "if a physical or mental injury continuously disables him from engaging in any occupation for wage or profit, for which he is reasonably qualified, by training, education or experience." (Admin. Rec., at CC 8.) This is the correct definition for "disability" only after the initial 24 month period and is thus inaccurate. It is a much more demanding definition of disability than inability to perform her own occupation. For this reason, the Court finds that the Committee's application of the Plan to the Plaintiff's disability claim was not made rationally and in good faith. Coca-Cola's decision is therefore reversed, and the Court orders that the Plaintiff be awarded benefits for the first 24 months of her disability.

C. *Failure to Provide Plan Documents Under ERISA § 502(c)*

The Plaintiff also claims penalties against the Defendants for failure to provide her with all the requisite plan documents. Under ERISA, the plan administrator is required, following a request by a claimant to "furnish a copy of the latest updated summary, [sic] plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." 29 U .S.C. § 1024(b)(4). If the administrator either refuses or fails to comply with such requests within 30 days, § 502(c) grants a district court with the discretion to subject the administrator to fines of up to $110.00 per day. 29 U.S.C. § 1132(c)(1); 29 C.F.R. § 2575.502c-1. In exercising this discretion, a court should consider whether a defendant's failure to provide documents was made in bad faith and whether it prejudiced a plan beneficiary. *See Scott v. Suncoast Beverage Sales, Ltd.,* 295 F.3d 1223, 1232 (11th Cir.2002). This penalty is designed as a punitive damage to the violator, not as compensation for the beneficiary. *Id.; see also Daughtrey v. Honeywell, Inc.,* 3 F.3d 1488, 1494 (11th Cir.1993) ("[T]he penalty range of up to $100 per day is unrelated to any injury suffered by the plan participant, suggesting that section 1132(c) is intended to punish noncompliance with the employer or administrator's disclosure obligations and not to compensate the participant.").

***7** On March 21, 2001, the Plaintiff made an exhaustive request to Coca-Cola for all documents relevant to the Plan. Gilbreath responded on April 24, 2001, confirming that Reliastar had already sent a copy of the Plan and the Summary Plan Description to the Plaintiff's counsel on April 3, 2001, in response to counsel's request on behalf of another client. Coca-Cola thus concluded, quite reasonably, that the Plaintiff did not need extra copies of the Plan. (Admin. Rec., at CC 2). Gilbreath further stated that Coca-Cola had authorized Reliastar to copy the contents of the Plaintiff's claim file and mail it to her. (*Id.,* at CC 3.) On April 27, 2001, at the request of Gilbreath, Reliastar sent to Byars' counsel a copy of the claim file. (*Id.,* at RS 89.) Then, as part of its initial disclosure on February 14, 2002, Coca-Cola furnished the Plaintiff with an extensive list of Plan documents. On March 4, 2002, Coca-Cola's counsel wrote the Plaintiff's counsel specifically identifying the documents Coca-Cola had provided the prior month and also providing a copy of the Plan's most recent annual report.

The Plaintiff contends that she did not receive all of the requisite Plan documents, seventeen in total, until March 4, 2002. This was 318 days after the deadline

set forth under § 502(c).[5] According to the Plaintiff's calculations, this results in a maximum total penalty award of $590,200.00.[6] The Plaintiff fails to demonstrate, however, that the Defendants' failure to provide all these documents was committed in bad faith or that she was prejudiced by this failure. She claims that because of this lack of information, she was "unaware of many aspects of the LTD Plan and prevented from making various claims administratively prior to litigation." (Pl.'s Mot. for Part. Summ. J., at 15.) She argues first that she was prejudiced because she had no way of knowing that the Committee had cited to the wrong definition of disability in its second denial. She further claims that when this Court dismissed her proposed class action claim in March 2004, she had no means of knowing that the Plan prevented an offset of her benefits below 60%. According to the Plaintiff, this "forced ignorance" prevented her from being able to raise certain administrative claims prior to filing her complaint. (*Id.,* at 18.) However, because the Plaintiff completed the administrative process on January 23, 2001, almost two months before she made her first request for Plan documents, any failure to respond by Coca-Cola could not have resulted in any "forced ignorance" on her part nor prevented her from being able to raise issues administratively.

Although she has shown no bad faith or prejudice, the Plaintiff asserts that "[t]he mere request for documents and the failure to produce the documents timely supports the awarding of penalties." (*Id.,* at 14.) Indeed, the Plaintiff's counsel appears to be using § 502(c) principally as a means not simply to ensure receipt of all relevant Plan documents, but as an extra sword in her arsenal of litigation tactics wielded to recover the maximum possible compensation for her client. As stated previously, this is not the purpose of the statute. *See Scott,* 295 F.3d at 1232. Furthermore, her March 21, 2001 request letter to Coca-Cola demanded every document under the sun that in any way related to Lisa Byars, including the following:

> ***8** We expect to be provided with every piece of information or physical or electronic evidence or evidence from any methods of transmission including paper, disk, tape, EDI or TYPHOON system concerning Ms. Byars claim including any information containing Ms. Byars's name or file/claim number or Social Security number or making any reference whatsoever to Ms. Byars. Any such information should be provided regardless of your company's individual definition of "claim file."

(Admin. Rec., at CC 5.) The Plaintiff then provided a thirteen part checklist of Plan documents to be provided by the Defendants, citing 29 C.F.R. § 2560.503-1(g) as authority for granting these requests.

The Plaintiff now claims that the Defendant's failure to promptly provide each one of these documents justifies an award of over half a million dollars. However, this Court has previously held that failure to produce documents required under a claims regulation does not subject an administrator to statutory penalties under § 502(c). *See Brucks,* 391 F.Supp.2d at 1212. Moreover, 29 C.F.R. § 2560.503-1 applies to ERISA § 503, not § 502. Accordingly, because Coca-Cola had already confirmed the Plaintiff's receipt of a copy of the Plan and the Summary Plan Description within the 30 day period and arranged for her to receive her claims file, the employer was rightfully dubious about granting the rest of the Plaintiff's counsel's requests. As the Plaintiff was not prejudiced by any delay, the Court finds no cause to assess any penalties. Summary Judgment for the Defendants on this claim is warranted.

D. *Attorney's Fees Under ERISA § 502(g)*

Both the Plaintiff and Defendant Reliastar also claim attorney's fees under 29 U.S.C. § 1132(g). The statute authorizes this Court to award reasonable attorney's fees and costs of action to either party in an ERISA action. The Eleventh Circuit considers the following factors in determining an award of attorney's fees:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorney's fees; (3) whether an award of attorney's fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question

> regarding ERISA itself; (5)[and] the relative merits of the parties' positions.

Wright v. Hanna Steel Corp., 270 F.3d 1336, 1344 (11th Cir.2001). Here, these factors do not weigh in favor of an award of attorney's fees against the Defendants or against the Plaintiff. The Court thus denies the Plaintiff's and Reliastar's motions.

IV. *CONCLUSION*

For the reasons set forth above, the Coca-Cola Defendants' Motion on Standard of Review [186] is GRANTED; their Motion for Summary Judgment [193] is GRANTED in part and DENIED in part; Reliastar's Motion for Summary Judgment [198] is GRANTED; the Plaintiff's Motion for Summary Judgment [192] is GRANTED in part and DENIED in part; and the Plaintiff's Motion for Partial Summary Judgment [195] is DENIED. The parties have 10 days to submit a proposed final judgment.

***9** SO ORDERED, this 28 day of August, 2006.

All Citations

Not Reported in F.Supp.2d, 2006 WL 2523095

Footnotes

1 For the sake of simplicity, the Court will collectively refer to Reliastar, NATLSCO, and Kemper as “Reliastar.”

2 Such evidence may be considered by the court in reviewing a plan administrator's decision, but it is not determinative. *Potter v. Liberty Life Assur. Co. of Boston,* 132 Fed. Appx. 253, 259 n. 5 (11th Cir.2005) (*citing Paramore v. Delta Air Lines, Inc.,* 129 F.3d 1446, 1452 n. 5 (11th Cir.1997) and *Kirwan v. Marriott Corp.,* 10 F.3d 784, 790 n. 32 (11th Cir.1994)).

3 Two other orthopedic surgeons also reviewed the Plaintiff's medical records and provided brief assessments. Dr. George Crane concluded that no objective evidence supported the Plaintiff's continued disability. (Admin. Rec., at CC 15.) In a two sentence report, Dr. Nathan Cohen gave his exceptionally passive opinion that “I do not feel there is not enough evidence to substantiate this woman returning to some kind of gainful occupation that would only require her to do a sitting job.” (*Id.,* at CC 99.)

4 This is used to test the nerves and muscles in the patient's entire lower extremity. A doctor will usually order this test when he suspects that there may be some type of problem with the nerve supply to the foot and leg. *See* Matthew Rockett, Browsing by Information on Special Testing Used for Diagnosis-Electromyography(EMG)/Nerve Conduction Velocity(NCV), *http://www.podiatrynetwork.com/document_disorders.cfm? id=220.*

5 To be in accord with § 502(c)'s 30 day requirement, these documents should have been produced by April 20, 2001.

6 The Plaintiff's math is a little off. With a maximum penalty of $110.00 per day multiplied by *316 days* (not 318 days) and again multiplied by 17 documents, the Court would arrive at this sum.

PROOF OF SERVICE

I, Michael E. Bindas, hereby certify that on June 5, 2017, I filed the foregoing *Opening Brief of Appellants James and Clifford Courtney*, with accompanying appendix, through the Court's electronic filing system. I further certify that on June 5, 2017, I caused to be served a copy of the *Opening Brief of Appellants James and Clifford Courtney*, with accompanying appendix, by messenger delivery to the following:

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I further certify that on June 5, 2017, I mailed a copy of the foregoing *Opening Brief of Appellants James and Clifford Courtney*, with accompanying appendix, by First Class U.S. mail, postage prepaid, to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of June, 2017, in Bellevue, Washington.

s/ Michael E. Bindas
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